108TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { 108–503

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REGARDING THE APPOINTMENT OF INDIVIDUALS TO FILL VACANCIES IN THE HOUSE OF REPRESENTATIVES

MAY 19, 2004.—Referred to the House Calendar and ordered to be printed

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Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

ADVERSE REPORT

together with

DISSENTING VIEWS

[To accompany H.J. Res. 83]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 83) proposing an amendment to the Constitution of the United States regarding the appointment of individuals to fill vacancies in the House of Representatives, having considered the same, report unfavorably thereon without amendment and recommend that the joint resolution do not pass.

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PURPOSE AND SUMMARY

The debate over constitutional amendments, like H.J. Res. 83, that allow appointed House Members in the wake of mass vacancies caused by a terrorist attack is a debate between those who would preserve a House of Representatives elected by the people, and those who would deny Americans the right to elected representation and place them under laws enacted by an appointed regime during the most crucial moments of American history. It is a debate between, on the one hand, the popular will, the essential right to elected representation, and the institutional legitimacy of the House of Representatives and, on the other hand, rule by an appointed aristocracy that owes its allegiance not to the people, but to those doing the appointing. Because the Committee rejects the notion of an appointed House, it reports H.J. Res. 83 adversely.

BACKGROUND

H.J. Res. 83 and other constitutional amendments denying the right to elected representation would accomplish what no terrorist could, namely striking a fatal blow to what has otherwise always been "The People's House." The House—unlike the Presidency [1] and the Senate [2] and unique among all branches and bodies of the entire Federal Government—is the only branch institutionally designed to always reflect the popular will.[3] H.J. Res. 83 and similar proposed constitutional amendments would allow legislation to be passed and habeas corpus (essentially the right to judicial review

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[1] *See* U.S. Const. Art. II, Section 1, cl. 6 (". . . Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."); 3 U.S.C. § 19(d)(1) (setting out list of presidential successors, including the following cabinet members: the Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, and Secretary of Veterans Affairs).

[2] *See* U.S. Const. Amend. XVII ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the Legislature of any State may empower the Executive thereof to make temporary appointments until the people fill the vacancies by election as the Legislature may direct."). The Senatorial vacancies provision was placed in the original Constitution because Senators, prior to the adoption of the Seventeenth Amendment that provided for the popular election of Senators, were elected by state legislatures, which were often only in session for several months at a time. *See* Joseph Story, A Familiar Exposition of the Constitution of the United States (Regnery Gateway: 1986) at 96. Article I, Section 3, of the Constitution as originally enacted provided that "The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof . . . if vacancies happen [in the Senate] by Resignation, or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next meeting of the Legislature, which shall then fill such Vacancies." The Seventeenth Amendment, which provided for the popular election of Senators, simply carried over the concept of state governors' appointment authority. Because it was the prospect of filling only occasional Senate vacancies, and not mass vacancies, by gubernatorial appointment that motivated passage of the Senate vacancies provisions, the application of the current Senate vacancies provision in the event of mass vacancies was unanticipated and is arguably in itself a constitutional flaw, as its application to mass vacancies would largely negate the motivation behind passage of the Seventeenth Amendment, namely a change in the Senate's fundamental character to a popularly-elected body. Adopting an amendment that also allows mass vacancies in the House to be filled by appointment would compound that constitutional flaw by extending it to the House of Representatives.

[3] *See* U.S. Const. Art. I, Section 2, cls. 1, 4 ("The House of Representatives shall be composed of Members chosen . . . by the People of the several States . . . When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.").

of illegal detentions)[4] to be suspended by a Congress[5] composed *entirely of the unelected.*

When terrorists attacked on September 11, 2001, it was an elected—not an appointed—Congress that acted in the wake of the attack, and the legislation passed by that elected Congress has a legitimacy that legislation passed by an appointed Congress would not have had. All of Congress's powers under Article I of the Constitution are only legitimately exercised by an elected House of Representatives. It would hardly be reassuring to the public to see, immediately following a devastating attack, the faces of hundreds of strangers writing the laws. Legislation passed by an appointed House that did not comport with the people's will would have to be repealed by a later-elected House, leading to further discontinuity at the very time continuity is most important.

Demonstrating that this is not a partisan issue, but one concerning the legitimacy of all Members of the House and of the legislation it passes, the House of Representatives in the past has rejected all constitutional amendments authorizing appointed House Members sent to it by the Senate, even during the height of the Cold War. The Houses of Representatives that rejected such amendments were controlled by Republicans in the 83rd Congress, and by Democrats in the 84th and 87th Congresses.[6]

H.J. RES. 83 AND OTHER CONSTITUTIONAL AMENDMENTS THAT ALLOW APPOINTED MEMBERS UNDERMINE ESSENTIAL CONSTITUTIONAL RIGHTS AND THE BASIS OF OUR NATION'S FOUNDING DOCUMENTS

Article I of the Constitution states "The House of Representatives shall be composed of Members chosen . . . by the People of the several States . . . When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

The Founders of our great nation were perhaps the most gifted political thinkers the world has ever known. They carefully crafted a republic in the Constitution and they articulated their defense of that document to the voters in the ratifying states in a series of newspaper articles that became known as the *Federalist Papers.* Not only did the Founders emphatically insist on the right to elected representation, the Founders also explicitly *rejected* the proposition that the appointment of Members is compatible with the American republic. In Federalist No. 52, James Madison stated:

> The definition of the right of suffrage is very justly regarded as a fundamental article of republican government. It was incumbent on the [Constitutional] convention, therefore, to define

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[4] *See* Black's Law Dictionary (7th ed. 1999) ("habeas corpus . . . A writ employed to bring a person before a court, most frequently to ensure that the party's imprisonment or detention is not illegal . . .").

[5] *See* U.S. Const. Art. I, Section 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[6] In 1960, the Senate sent to the House a constitutional amendment allowing the District of Columbia electoral votes in presidential elections which had attached to it another constitutional amendment allowing appointed House Members in the event of mass vacancies. The House specifically stripped out the constitutional amendment allowing appointed House Members, and sent the rest back to the Senate in modified form, which became the Twenty-third Amendment. *See generally* Sula P. Richardson and Paul S. Rundquist, Congressional Research Service, CRS Report to Congress, House Vacancies: Proposed Constitutional Amendments for Filling Them Due to National Emergencies (April 16, 2004) at 8–9 (discussing history of previously proposed constitutional amendments allowing an appointed House).

> and establish this right in the Constitution. *To have left it open for the occasional regulation of the Congress, would have been improper for the reason just mentioned.*[7]

Further, in his "Speech in the Federal Convention on Suffrage," Madison stated:

> The right of suffrage is certainly one of the fundamental articles of republican Government, and ought not to be regulated by the Legislature. *A gradual abridgement of this right has been the mode in which Aristocracies have been built on the ruins of popular forms.*[8]

Constitutional amendments that would allow vacant House seats to be filled by appointment were explicitly rejected by the Founders as antithetical to republican government, and a "republican form of government" is guaranteed in the Constitution.[9] As James Madison made clear, that means a form of government under rules passed by the duly elected representatives of the people.

Over and over, the Founders reiterated the foundational importance of the right to elected representation.

In Federalist No. 35, Alexander Hamilton wrote:

> Is it not natural that a man who is a candidate for the favor of the people, and who is dependent on the suffrages of his fellow-citizens for the continuance of his public honors, should take care to inform himself of their dispositions and inclinations, and should be willing to allow them their proper degree of influence upon his conduct? This dependence [constitutes] the strong chords of sympathy between the representative and the constituent.[10]

In Federalist No. 39, James Madison wrote that "The House of Representatives . . . is elected immediately by the great body of the people . . . The House of Representatives will derive its powers from the people of America."[11] Madison also wrote that:

> If the plan of the [Constitutional] convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible . . . What, then, are the distinctive characters of the republican form [of government]? . . . It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it . . .[12]

Madison used the strongest of terms when stating the House must be composed only of those elected by the people. Madison wrote in Federalist No. 52 that:

> As it is essential to liberty that the government in general should have a common interest with the people, so it is *particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with, the people. Fre-*

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[7] Federalist No. 52 (Madison) at 326 (Clinton Rossiter ed., 1961) (emphasis added).

[8] James Madison, "Speech in the Federal Convention on Suffrage," (August 7, 1787) reprinted in *James Madison: Writings* (Jack N. Rakove, ed. 1999) at 132.

[9] *See* U.S. Const. Art. IV, Section 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government.").

[10] Federalist No. 35 (Hamilton), at 216 (Clinton Rossiter ed., 1961).

[11] *Id.* at 242, 244.

[12] *Id.* at 240–41 (emphasis in original).

> *quent elections are unquestionably the only policy* by which this dependence and sympathy can be effectually secured."[13]

Madison refers to the "requisite dependence of the House of Representatives on their constituents.[14]

In Federalist No. 57, Madison wrote:

> Who are to be the electors of the Federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States.[15]

Madison also wrote that "The elective mode of obtaining rulers is the characteristic policy of republican government"[16] and that "[i]f we consider the situation of the men on whom the free suffrages of their fellow-citizens may confer the representative trust, we shall find it involving every security which can be devised or desired for their fidelity to their constituents."[17] Madison concluded that "[a]ll these securities" of a free government "would be found very insufficient without the restraint of . . . elections,"[18] and he summed up his reflections as follows: "Such will be the relation between the House of Representatives and their constituents. Duty, gratitude, interest, ambition itself, are the chords by which they will be bound to fidelity and sympathy with the great mass of the people."[19]

Further, from the notes James Madison kept of the debates at the Constitutional Convention, it is clear that House elections were considered indispensable to legitimate government. According to those notes, Madison "considered the popular election of one branch of the National Legislature as essential to every plan of free Government . . . He thought too that the great fabric to be raised would be more stable and durable, if it should rest on the solid foundation of the people themselves . . ."[20] Madison also "considered an election of one branch at least of the Legislature by the people immediately, as a clear principle of free Govt. and that this mode under proper regulations had the additional advantage of securing better representatives . . ."[21] George Mason

> argued strongly for an election of the larger branch by the people. It was to be the grand depository of the democratic principle of the Govt. It was, so to speak, to be our House of Commons—It ought to know & sympathise with every part of the community; and ought therefore to be taken not only from different parts of the whole republic, but also from different districts of the larger members of it . . ."[22]

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[13] *Id.* at 327 (emphasis added).
[14] *Id.* at 328.
[15] *Id.* at 351.
[16] *Id.*
[17] *Id.*
[18] *Id.* at 352.
[19] *Id.* at 353.
[20] Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787 (Jonathan Elliot, ed. 1845) (as reported by James Madison, notes of May 31, 1787) at 137.
[21] *Id.* at 161 (notes of June 6, 1787).
[22] *Id.* at 136 (notes of May 31, 1787).

Mason also "urged the necessity of retaining the election by the people. Whatever inconveniency may attend the democratic principle, it must actuate one part of the Govt. It is the only security for the rights of the people."[23] James Wilson "contended strenuously for drawing the most numerous branch of the Legislature immediately from the people. He was for raising the Federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible."[24] Wilson also "considered the election of the 1st. branch by the people not only as the corner Stone, but as the foundation of the fabric [of the Constitution] . . ."[25]

H.J. RES. 83 RISKS GRAVE DISCONTINUITY IN REPRESENTATIVE GOVERNMENT

H.J. Res. 83 contains all the flaws, discussed previously, of amendments allowing the appointment of non-elected Members, and has some unique additional problems.[26]

H.R. 2844, the "Continuity in Representation Act," which passed the House on April 22, 2004, on an overwhelming bipartisan vote of 306–97 (with more Democrats voting for it than against it), will ensure that the House is repopulated by legitimate democratic means within 45 days after an attack causes mass vacancies in the House.[27] Many states, of course, could conclude special elections

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[23] *Id.* at 223 (notes of June 21, 1787).

[24] *Id.* at 136 (notes of May 31, 1787).

[25] *Id.* at 223 (notes of June 21, 1787).

[26] Other proposed constitutional amendments introduced in the 108th Congress that would allow lawmaking by an appointed Congress all share the fundamental flaw of denying the right to elected representation.

H.J. Res. 89, introduced by Rep. John Larson on March 11, 2004, would allow state legislatures to appoint replacement House Members, thereby turning the House into what the Senate was before the Seventeenth Amendment made Senators subject to popular election, namely a body composed entirely of unelected Members. The appointment of Members by state legislatures was specifically rejected by the Founders at the Constitutional Convention. James Madison, for example, according to his notes of the Convention Debates on May 31, 1787, successfully argued "that, if the first branch of the general legislature [the House] should be elected by the State Legislatures . . . the people would be lost sight of altogether; and the necessary sympathy between them and their rulers and officers, too little felt." Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787 (Jonathan Elliot, ed. 1845) (as reported by James Madison, notes of May 31, 1787) at 137.

H.J. Res. 90, introduced by Rep. Zoe Lofgren on March 11, 2004, is an open-ended authorizing amendment that makes the right to elected representation subject to implementing legislation that could be revised by Congress at any time. Such a proposal invites Congress and the ratifying states to "buy a pig-in-a-poke" because even if such an amendment were ratified, Congress could alter its implementing language at any time thereafter. Indeed, under Rep. Lofgren's proposed amendment, if large numbers of representatives or Senators were killed in an attack, the remaining Representatives and Senators could repeal any implementing legislation previously enacted and pass legislation that would immediately install only persons of their choosing in the House.

H.J. Res. 92, introduced by Rep. Dana Rohrabacher on April 2, 2004, provides that any time there were a vacancy in the House, or a Member were deemed unable to serve, that Member's seat would be filled by an "acting" Representative drawn from a list of successors the elected Member submitted at least 60 days before taking office. The amendment bans special elections forever. By providing that "[a]ppointments pursuant to this section shall be effective during the term of office for which the person elected as Representative has been elected," H.J. Res. 92 thereby prohibits special elections from being held at any time, permanently banning special elections, even in non-emergency circumstances.

[27] *See generally* H.R. Rep. No. 108–404, Pt. II (2004). The *Federalist Papers* make clear that H.R. 2844—and not proposals to deny the right to elected representation—is the approach to preserving continuity in government that is consistent with constitutional values and principles. Congress has the clear constitutional authority to enact H.R. 2844 under Article I, Section 4, clause 1 of the Constitution, which states that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations* . . ." In *Smiley* v. *Holm,* 285 U.S. 355 (1932), the Supreme Court held that "[i]n exercising this power, the Congress may supplement . . . state regulations or may substitute its own . . . It has a general supervisory power over the whole subject." *Id.* at 366–67 (quotations and citations omitted). The Supreme Court described "the whole subject" over which Congress has general supervisory power as follows: "The subject-matter is the 'times, places and manner of holding elec-

much sooner.[28] H.R. 2844 resonates best with American ideals by providing that, following a devastating terrorist attack, millions of people around the country might fill schools and gymnasiums, churches and meeting halls, and freely exercise—in the wake of terrible actions by those who hate self-government—their right to elected representation and government under laws enacted by elected representatives, a right that has survived uninterrupted throughout the history of the United States. Within that 45 days in which legitimate elections would be conducted under H.R. 2844, any constitutional amendment that allowed rule by appointed Members could only present far more dangers than benefits.

H.J. Res. 83, by providing states with unlimited time in which to hold special elections to fill vacancies,[29] risks grave *discontinuity* in government. H.J. Res. 83 not only would override H.R. 2844, but it would forever strip Congress of its essential discretionary authority to expedite special elections in emergencies under its existing Article I, Section 4, clause 1 powers.[30] Further, proposals that

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tions for senators and representatives.' It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections . . ." *Id.* at 366. Also, the House alone has the authority to judge the elections of its own Members. Article I, Section 5, clause 1 of the Constitution provides that "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .".

In passing H.R. 2844, the House has acted to uphold the Founders' understanding of what is essential to democracy, maintain the uninterrupted tradition that only duly elected Members serve in the House of Representatives, and preserve the American people's right to chosen representatives. Consistent with the right to chosen representation, the Founders explicitly considered Congress' power to require expedited special elections the solution to potential discontinuity in government in emergency situations.

Contrary to the assertions of some, the Founders did foresee scenarios in which large numbers of vacancies were created in Congress, and still they defended the necessity of elections to fill such vacancies. As Alexander Hamilton wrote in Federalist No. 59, in discussing Article I, Section 4, clause 1, "[The Constitutional Convention] have reserved to the national authority a right to interpose [in Federal elections], whenever extraordinary circumstances might render that interposition necessary to its safety. Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the choice of persons to administer its affairs." Federalist No. 59 (Hamilton) at 363 (Clinton Rossiter ed., 1961).

Hamilton continued in Federalist No. 59: "The natural order of the subject leads us to consider, in this place, that provision of the Constitution which authorizes the national legislature to regulate, in the last resort, the election of its own members . . . I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that *every government ought to contain in itself the means of its own preservation* . . . It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere . . ." Federalist No. 59 (Hamilton) at 361–62 (Clinton Rossiter ed., 1961) (emphasis in original).

H.R. 2844 is founded on clear, existing constitutional authority, and it preserves the vital, time-tested constitutional value of elected representation that has made this country the most successful experiment in *self-governance* the world has ever known.

[28] As the Congressional Budget Office has pointed out, 10 states require special elections within 45 days in normal circumstances. *See* Congressional Budget Office, Cost Estimate of H.R. 2844 (January 23, 2004) at 2 (reprinted in H.R. Rep. No. 108–404, Pt. I, at 7 (2003)). Minnesota, for example, requires that House vacancies be filled within 33 days. *See* Minn. Stat. §204D.19 ("Special election when the congress or legislature will be in session . . . when a vacancy occurs and the congress or legislature will be in session so that the individual elected as provided by this section could take office and exercise the duties of the office immediately upon election, the governor shall issue within 5 days after the vacancy occurs a writ calling for a special election. The special election shall be held as soon as possible . . . but in no event more than 28 days after the issuance of the writ.").

[29] Section 2 of H.J. Res. 83 broadly allows that "The State shall provide for an election to fill the vacancy at such time and in accordance with such procedures as may be provided under State law . . ."

[30] Article I, Section 4, clause 1 of the Constitution provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . ." H.J. Res. 83, Section 2, would provide only that "*The State* shall provide for

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allow long periods of time in which special elections can occur pose the substantial risk that on 1 week, for example, a few Democratic Members will arrive at the Capitol to take their seats, giving control of the House to Democrats who can elect their own Speaker, but then the next week some Republican Members will arrive and switch control of the House back to the Republicans, with this disruptive process repeating itself, and tipping the balance of party control back and forth, for weeks, leading to massive discontinuity in government rather than continuity in government.

If—under H.J. Res. 83 and similar proposed constitutional amendments—appointed Members are allowed to run in the special elections following their appointment, they would be distracted by campaign politics at the very moment they are expected to be focusing on legislative duties. If—on the other hand—such amendments prohibit appointed Members from running in such special elections, they would have no institutional connection to the popular will.

H.J. Res. 83 requires House Members, prior to taking the oath of office, to submit a list of names to the Governor that the Governor can draw from in appointing that Member's replacement in the event a majority of House Members cannot perform their duties.[31] This would subject candidates to endless questions during their campaigns regarding whom they placed on the list and why. In so doing, it would create needless distractions during the campaign that would deny the voters a clear choice between individual candidates. If a candidate announced who was on his or her list, each person on the list would be subject to campaign scrutiny. If a candidate did not tell the press who was on his or her list, the voters would not have any say in who the candidate's potential replacements should be. Such a list would also invite great mischief by allowing a candidate to secretly place on the list the names of people unprepared or unqualified to serve but who had contributed large amounts to the candidate's campaign, or the names of people to whom the candidate owes political favors. Under H.J. Res. 83, each Member can revise the list of replacements at any time.[32] That means that in the event the amendment's appointment provisions are triggered, the voters in a Member's district could become "represented" by someone who would act in their name but whom they had no knowledge of and no say in electing.

H.J. Res. 83 also provides in Section 4 that "Congress may by law establish the criteria for determining whether a Member of the House of Representatives or Senate is dead or incapacitated. . . ." This provision would deny the House its existing authority to address incapacitation by House rules[33]—an authority the House Rules Committee is already exercising—and needlessly involve the

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an election to fill the vacancy at such time and in accordance with such procedures as may be provided under State law . . .". (Emphasis added.)

[31] Section 2 of H.J. Res. 93 provides "If at any time a majority of the whole membership of the House of Representatives are unable to carry out their duties because of death or incapacity, or if at any time the House adopts a resolution declaring that extraordinary circumstances exist which threaten the ability of the House to represent the interests of the people of the United States, the chief executive of any State represented by any Member who is dead or incapacitated at that time shall appoint, from the most recent list of nominees presented by the Member under section 1, an individual to take the place of the Member."

[32] Section 1 of H.J. Res. 83 provides that "After the individual takes the oath of office, the individual may present revised versions of the list at any time during the Congress."

[33] *See* U.S. Const. Art. I, Section 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . .).

Senate in how the House operates. By doing so, it would unfortunately make addressing continuity in government more difficult than it already is.

H.J. RES. 83, ALONG WITH POSING RISKS TO CONTINUITY IN GOVERNMENT, IS UNNECESSARY

Contrary to the claim made by some proponents of constitutional amendments, H.J. Res. 83 is not necessary to restrain the President in his conduct immediately following a catastrophic terrorist attack. Indeed, the Founders made clear that the President would always be subject to the threat of impeachment by the House of Representatives [34]—either a House operating on reduced membership,[35] or a later fully reconstituted House—if the President abused executive authority at any time. Alexander Hamilton, in Federalist No. 66, wrote that "the powers relating to impeachments are . . . an essential check in the hands of that body [the House] upon the encroachments of the executive." [36] And of course, no law could be enacted by a House operating with only a few Members alone, as the approval of a full Senate, filled with appointed Senators if necessary, would be required.

Further, Congress would not have to assemble immediately after a terrorist attack because Congress has already granted the President, by statute, wide authority to act in emergency circumstances. Congress has granted the President specific statutory authority to use the armed forces as he considers necessary to prevent unlawfulness.[37] Congress has also granted the President specific statutory authority to call the armed forces into service to enforce Federal law "as he considers necessary to enforce those laws." [38] Congress has already granted the President the power to activate

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[34] *See* U.S. Const. Art. I, Section 2, clause 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."); U.S. Const. Article II, Section 4, clause 1 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

[35] The House Rules provide that a quorum of the House is a majority of those Members duly sworn, elected, *and living.* House Rule XX(5)(c) provides that "Upon the death, resignation, expulsion, disqualification, or removal of a Member, the whole number of the House shall be adjusted accordingly. The Speaker shall announce the adjustment to the House."

[36] Federalist No. 66, at 402 (Alexander Hamilton) (Clinton Rossiter ed. 1961). Hamilton also wrote, in Federalist No. 77, that "We have now completed a survey of the structure and powers of the executive department, which, I have endeavored to show, combines, as far as republican principles will admit, all the requisites to energy. The remaining inquiry is: Does it also combine the requisites to safety, in a republican sense, a due dependence on the people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances; [including] *his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law.*" Federalist No. 77, at 463–64 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (emphasis added).

[37] *See* 10 U.S.C. § 333 ("The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws. In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.").

[38] 10 U.S.C. § 332 ("Use of militia and armed forces to enforce Federal authority") ("Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.").

many other emergency authorities.[39] And again, any President will know that if he or she abuses these authorities, they will be subject to impeachment proceedings.

In addition, the Constitution and Federal law clearly allow the President to take action to protect the nation without congressional approval. The War Powers Act specifically recognizes that the President may have to take action to protect the nation in situations in which Congress is physically unable to meet.[40] While our Constitution provides that only Congress can "declare war," the Framers of our Constitution specifically rejected a proposal that would have given Congress the power to "make" war.[41] Instead, the Framers made the President the Commander-in-Chief.[42] (Congress has not exercised its power to "declare war" since World War II.)

Finally, the issue of incapacitated House Members can be handled by changes to House rules, and the House Rules Committee is already exploring those options.[43]

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[39] In accordance with the requirements of the National Emergencies Act, 50 U.S.C. §§ 1601–1651 (providing for an exclusive means by which the President may declare a national emergency), the President may activate a variety of statutory authorities by declaring a national emergency. The President may also declare a national emergency and invoke the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701–1706, and order its implementation to block property and prohibit transactions with persons who commit, threaten to commit, or support terrorism. The President also has the authority, found at 10 U.S.C. § 2808, to authorize the Secretary of Defense, in time of declared war or national emergency declared by the President, and without regard to any other provision of law, to undertake military construction projects and to authorize the secretaries of the military departments to undertake such construction projects, not otherwise authorized by law, as are necessary to support use of the armed forces.

[40] *See* 50 U.S.C. § 1544(b) ("Within sixty calendar days after a report is submitted or is required to be submitted pursuant to [this Act], the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.").

[41] *See* 2 Max Farrand, The Records of the Federal Convention of 1787, 313, 318–19 (rev. ed. 1937).

[42] *See* U.S. Const. Art. II, Section 2, cl.1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . ."). The Founders also made clear that the President alone must have the power to wage war against America's enemies. As Alexander Hamilton wrote in Federalist No. 74, "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority." Federalist No. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed. 1961). As Alexander Hamilton stated in Federalist No. 23, referring to the common defense, "*it is impossible to foresee or define the extent and variety of national exigencies, and the corresponding extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." Federalist No. 23, at 153 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (emphasis in original).

[43] The one time the Supreme Court has spoken on the issue of Congressional quorums, it granted the House, and even the Speaker of the House, enormous discretion to "count" Members for purposes of determining whether a quorum exists. In *United States* v. *Ballin,* 144 U.S. 1, 6 (1892), the Court was asked to determine whether the Speaker of the House could "count" for purposes of a quorum Members he ascertained were part of a cabal that was simply refusing to answer a quorum call in an attempt to deny the House a quorum and stop legislative business from going forward. In holding the Speaker could count Members who were refusing to answer a quorum call as part of a quorum, the Court stated that:

> But how shall the presence of a majority be determined? *The constitution has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact.* It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count, as the sole test; or the count of the speaker or the clerk, and an announcement from the desk of the names of those who are present.

Id. at 6 (emphasis added).

The Supreme Court in *Ballin* was quite emphatic regarding the wide latitude it would give the House in determining the rules of its proceedings: "Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With

RESPONSE TO REP. BAIRD'S LETTER OF MAY 13, 2004

As this report was being prepared, Representative Baird sent a letter to Chairman Sensenbrenner and Ranking Member Conyers dated May 13, 2004. The letter raises several issues that are addressed in the text of this report, and contains several misstatements, the most egregious of which are addressed here.

Rep. Baird's letter states that Chairman Sensenbrenner asserted that H.J. Res. 83 would "deny the right to elected representation," and that such statement is "false." The wider quote of Chairman Sensenbrenner in his opening statement is that constitutional amendments allowing appointed House Members in the wake of mass vacancies caused by a terrorist attack "would deny the right to elected representation during the most crucial moments of American history." This statement is of course self-evidently true: the time closely following a terrorist attack would be among the most crucial moments of American history, and each moment within that time in which Americans are governed by appointed Members would be a denial of the right to *elected* representation.

Rep. Baird's letter states that "nothing in H.J. Res. 83 would" override H.R. 2844. Section 2 of H.J. Res. 83 would amend the Constitution to provide that "[t]he State shall provide for an election to fill the vacancy at such time and in accordance with such procedures *as may be provided under State law . . .*" (Emphasis added.) H.R. 2844 is *federal* legislation that would establish a general 45-day time frame during emergencies within which expedited special elections must be conducted. H.J. Res. 83 would clearly allow State law to trump a congressionally enacted time frame in H.R. 2844.

Rep. Baird's letter also claims the statement that H.J. Res. 83 would "forever strip Congress of its authority to expedite special elections in emergencies under its existing constitutional authority" is a "fabrication." To the contrary, the statement is true. Article I, Section 4, clause 1 of the Constitution provides that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations . . .*" (Emphasis added.) Section 2 of H.J. Res. 83 would provide that *"[t]he State* shall provide for an election to fill the vacancy at such time and in accordance with such procedures as *may be provided under State law . . ."* (Emphasis added.) Again, H.J. Res. 83, which would apply in emergency circumstances in which there were mass vacancies in the House, would clearly allow State law to trump a congressionally enacted time frame in H.R. 2844, a time frame that could be enacted under Congress's current Article I, Section 4, clause 1 authority, but which would be trumped by State law were H.J. Res. 83 to be ratified as an amendment to the Constitution.

Rep. Baird's letter cites to what he alleges to be "mutually contradictory" statements regarding how the House could function

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the courts the question is only one of power. The constitution empowers each house to determine its rules of proceedings." *Id.* at 5. *See also* Article I, §5, clause 2 of the Constitution ("Each house may determine the Rules of its Proceedings . . .").

If the Speaker can take cognizance of Members who are present, but not willing to vote, it likely follows that the Speaker can take cognizance of Members who are incapacitated, and not able to vote, when determining whether or not a quorum of Members exists for purposes of conducting House business.

after a catastrophe. Those statements are: "no law could be enacted solely by a House operating with only a few Members alone" and "[t]here is already a House rule that provides that a quorum shall consist of Members who are living. During a time of disaster when many Members have died, the Speaker can adjust the required quorum to reflect the number of Members still living." These statements are both true, and there is no contradiction. The first statement is that "no *law* could be *enacted* solely by a House operating with only a few Members alone." Certainly no bill that passes the House can become a law without being passed by both the House and Senate. The second statement states that House rules provide that the *House* can act with a quorum of living Members.[44] The House alone cannot enact legislation, although it can act to pass bills from the House with a majority of living Members, and the two statements are therefore consistent.

Finally, Rep. Baird's letter states that Chairman Sensenbrenner assertion during the markup "that decisions of an appointed Congress would be subject to later challenge" is "self contradictory." Rep. Baird's statement apparently is based on a false assumption that Chairman Sensenbrenner was referring to a constitutional challenge and a mishearing of what Chairman Sensenbrenner actually said at the markup of H.J. Res. 83. What Chairman Sensenbrenner said was "legislation passed by an appointed House that did not comport with the people's will would have to be repealed by a later elected House, leading to further discontinuity at the very time continuity is most important."

HEARINGS

No hearings were held on H.J. Res. 83. The Committee's Subcommittee on the Constitution held a hearing on H.J. Res. 67, a similar amendment to the Constitution of the United States sponsored by Rep. Brian Baird, during the 107th Congress on February 28, 2002. Testimony was received from Charles Tiefer, University of Baltimore School of Law; Harold Relyea, Specialist in American National Government, Congressional Research Service; M. Miller Baker, McDermott, Will & Emery; and Norman Ornstein, Resident Scholar, American Enterprise Institute for Public Policy Research, with additional material submitted by individuals and organizations.

COMMITTEE CONSIDERATION

On May 5, 2004, the Committee met in open session and adversely reported the joint resolution H.J. Res. 83 without amendment by a recorded vote of 17 to 12, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following rollcall votes occurred during the Committee's consideration of H.J. Res. 83.

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[44] *See* House Rule XX(5)(c).

1. Mr. Chabot made a motion to table Ms. Lofgren's motion to postpone consideration of H.J. Res. 83 until May 20, 2004. By a rollcall vote of 19 yeas to 12 nays, the motion was agreed to.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake			
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Meehan		X	
Mr. Delahunt		X	
Mr. Wexler			
Ms. Baldwin		X	
Mr. Weiner			
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	19	12	

2. Mr. Chabot made a motion to table Ms. Lofgren's motion to further postpone consideration of H.J. Res. 83 until a time subsequent to May 20, 2004. By a rollcall vote of 12 yeas to 6 nays, the motion was agreed to.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly			
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Jenkins			
Mr. Cannon			
Mr. Bachus			
Mr. Hostettler			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Green	X		
Mr. Keller	X		
Ms. Hart			
Mr. Flake			
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt			
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin			
Mr. Weiner			
Mr. Schiff		X	
Ms. Sánchez			
Mr. Sensenbrenner, Chairman	X		
Total	12	6	

3. Motion to Report Adversely. The motion to report the joint resolution, H.J. Res. 83, adversely was agreed to by a rollcall vote of 17 yeas to 12 nays.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon			
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake			
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Ms. Lofgren			
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Meehan		X	
Mr. Delahunt		X	
Mr. Wexler			
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	17	12	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this joint resolution does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the joint resolution, H.J. Res. 83, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 7, 2004.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.J. Res. 83, a joint resolution proposing an amendment to the Constitution of the United States regarding the appointment of individuals to fill vacancies in the House of Representatives.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Matthew Pickford (for Federal costs), who can be reached at 226–2860, and Sarah Puro (for the State and local impact), who can be reached at 225–3220.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.J. Res. 83—A joint resolution proposing an amendment to the Constitution of the United States regarding the appointment of individuals to fill vacancies in the House of Representatives.

H.J. Res. 83 would propose amending the Constitution to provide for the continuity of the House of Representatives if a majority of Members become unable to fulfill their responsibilities. For it to become effective, the legislatures of three-fourths of the states would need to ratify the proposed amendment within 7 years. By itself, this resolution would have no impact on the Federal budget. If the proposed amendment is approved by the States, the Federal Government could incur administrative expenses to implement it, but CBO estimates that such costs, if any, would be minimal. Enacting H.J. Res. 83 would not affect direct spending or revenues.

H.J. Res. 83 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. Although the amendment could only take effect upon approval by three-fourths of the state legislatures, no State would be required to take action on the resolution, either to reject it or to approve it.

The CBO staff contacts for this estimate are Deborah Reis and Matthew Pickford (for Federal costs), who can be reached at 226–2860, and Sarah Puro (for the State and local impact), who can be reached at 225–3220. This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goal and objective of H.J. Res. 83 would be to allow appointed Members of the House of Representatives in the event of mass vacancies and emergency circumstances.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article V of the Constitution, which provides that the Congress has the authority to propose amendments to the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Sec. 1. Section 1 provides that, prior to taking the oath of office, an individual who is elected to serve as a Member of the House of Representatives for a Congress shall present to the chief executive of the State from which the individual is elected a list of nominees to take the individual's place in the event the individual dies or becomes incapacitated prior to the expiration of the individual's term of office. The individual shall ensure that the list contains the names of not fewer than two nominees, each of whom shall meet the qualifications for service as a Member of the House of Representatives from the State involved. After the individual takes the oath of office, the individual may present revised versions of the list at any time during the Congress. These provisions would deny

the right to government under laws enacted by elected representatives.

Sec. 2. Section 2 provides that if at any time a majority of the whole membership of the House of Representatives are unable to carry out their duties because of death or incapacity, or if at any time the House adopts a resolution declaring that extraordinary circumstances exist which threaten the ability of the House to represent the interests of the people of the United States, the chief executive of any State represented by any Member who is dead or incapacitated at that time shall appoint, from the most recent list of nominees presented by the Member under § 1, an individual to take the place of the Member. The chief executive shall make such an appointment as soon as practicable (but in no event later than 7 days) after the date on which Member's death or incapacity has been certified. An individual appointed to take the place of a Member of the House of Representatives under this section shall serve until the Member regains capacity or until another Member is elected to fill the vacancy resulting from the death or incapacity. The State shall provide for an election to fill the vacancy at such time and in accordance with such procedures as may be provided under State law, and an individual appointed under this section may be a candidate in such an election. This section shall not apply with respect to any Member of the House who dies or becomes incapacitated prior to the 7-day period which ends on the date on which the event requiring appointments to be made under this section occurs. These provisions would deny the right to government under laws enacted by elected representatives, override the existing constitutional authority of the House to determine the rules of its proceedings, override current constitutional quorum requirements, and override the existing constitutional discretionary authority of Congress to require expedited special elections in emergency circumstances.

Sec. 3. Section 3 provides that during the period of an individual's appointment under § 2, the individual shall be treated as a Member of the House of Representatives for purposes of all laws, rules, and regulations, but not for purposes of § 1. If an individual appointed under § 2 is unable to carry out the duties of a Member during such period because of death or incapacity, the chief executive of the State involved shall appoint another individual from the same list of nominees presented under § 1 from which the individual was appointed under § 2. Any individual so appointed shall be considered to have been appointed under § 2. These provisions would deny the right to government under laws enacted by elected representatives.

Sec. 4. Section 4 provides that Congress may by law establish the criteria for determining whether a Member of the House of Representatives or Senate is dead or incapacitated, and shall have the power to enforce this article through appropriate legislation. These provisions would override the existing constitutional authority of the House to determine the rules of its proceedings.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, the Committee notes H.J. Res. 83 makes no changes to existing law.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, MAY 5, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:09 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr., Chairman of the Committee, presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

Pursuant to notice, I now call up House Joint Resolution 83, Proposing an Amendment to the Constitution of the United States Regarding the Appointment of Individuals to Fill Vacancies in the House of Representatives for purposes of markup, and move its adverse recommendation to the House.

Without objection, the Joint Resolution will be considered as read and open for amendment at any point.

[The resolution, H.J. Res. 83, follows:]

IA

108TH CONGRESS
1ST SESSION

H. J. RES. 83

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to fill vacancies in the House of Representatives.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 8, 2003

Mr. BAIRD introduced the following joint resolution; which was referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to fill vacancies in the House of Representatives.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

"ARTICLE —

"SECTION 1. Prior to taking the oath of office, an individual who is elected to serve as a Member of the House of Representatives for a Congress shall present to the chief executive of the State from which the individual is elected a list of nominees to take the individual's place in the event the individual dies or becomes incapacitated prior to the expiration of the individual's term of office. The individual shall ensure that the list contains the names of not fewer than two nominees, each of whom shall meet the qualifications for service as a Member of the House of Representatives from the State involved. After the individual takes the oath of office, the individual may present revised versions of the list at any time during the Congress.

"SECTION 2. If at any time a majority of the whole membership of the House of Representatives are unable to carry out their duties because of death or incapacity, or if at any time the House adopts a resolution declaring that extraordinary circumstances exist which threaten the ability of the House to represent the interests of the people of the United States, the chief executive of any State represented by any Member who is dead or incapacitated at that time shall appoint, from the most recent list of nominees presented by the Member under section 1, an indi-

vidual to take the place of the Member. The chief executive shall make such an appointment as soon as practicable (but in no event later than seven days) after the date on which Member's death or incapacity has been certified. An individual appointed to take the place of a Member of the House of Representatives under this section shall serve until the Member regains capacity or until another Member is elected to fill the vacancy resulting from the death or incapacity. The State shall provide for an election to fill the vacancy at such time and in accordance with such procedures as may be provided under State law, and an individual appointed under this section may be a candidate in such an election. This section shall not apply with respect to any Member of the House who dies or becomes incapacitated prior to the seven-day period which ends on the date on which the event requiring appointments to be made under this section occurs.

''SECTION 3. During the period of an individual's appointment under section 2, the individual shall be treated as a Member of the House of Representatives for purposes of all laws, rules, and regulations, but not for purposes of section 1. If an individual appointed under section 2 is unable to carry out the duties of a Member during such period because of death or incapacity, the chief executive of the State involved shall appoint another individual from

the same list of nominees presented under section 1 from which the individual was appointed under section 2. Any individual so appointed shall be considered to have been appointed under section 2.

''SECTION 4. Congress may by law establish the criteria for determining whether a Member of the House of Representatives or Senate is dead or incapacitated, and shall have the power to enforce this article through appropriate legislation.''.

○

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes to speak on the——

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. Mr. Chairman, I seek recognition in order to ask unanimous consent, in view of the seriousness of this matter, that the author of this proposed constitutional amendment, Mr. Baird, be given a few minutes to address the Committee and explain the amendment.

Chairman SENSENBRENNER. Is there objection?

Mr. CHABOT. I object.

Chairman SENSENBRENNER. Objection is heard.

The Chair now recognizes himself for 5 minutes to explain the amendment. The debate over constitutional amendments that allow appointed House Members in the wake of mass vacancies caused by a terrorist attack is a debate between those who would preserve a House of Representatives elected by the people and those who would deny the right to elected representation during the most crucial moments of American history and allow rule by an appointed aristocracy that owes its allegiance not to the people, but to those doing the appointing.

Let's be clear. Any constitutional amendment denying the right of elected representation would accomplish what no terrorist could, namely, striking a fatal blow to what has otherwise been the people's House. The House, unlike the presidency and the Senate, and unique amongst all branches and bodies of the entire Federal Government, is the only branch institutionally designed to reflect the popular will through legislation it passes.

When terrorists attacked on September 11th, 2001, it was an elected, not an appointed Congress, that acted in its wake, and the legislation passed by that elected Congress has a legitimacy that legislation passed by an appointed Congress would not have had. All of Congress's powers under article I of the Constitution are only legitimately exercised by an elected House of Representatives.

H.R. 2844, the "Continuity in Representation Act," which passed the House 2 weeks ago on an overwhelming bipartisan vote of 306 to 97, with more Democrats voting for it than against it, will ensure that the House is repopulated by a legitimate democratic means within a maximum of 45 days after an attack causes mass vacancies in the House. Within those 45 days, any constitutional amendment that allowed rule by appointed Members would pose far more risk than benefits. Legislation passed by an appointed House that did not comport with the people's will would have to be repealed by a later elected House, leading to further discontinuity at the very time continuity is most important.

The Founders explicitly rejected the proposition that the appointment of Members is compatible with the American Republic. James Madison wrote that "it is particularly essential that the House should have an immediate dependence on and intimate sympathy with the people," and that elections are "unquestionably the only policy by which this dependence and sympathy can effectively be secured." As Madison stated in his speech to the Constitutional Convention, "a gradual abridgement of the right to elected rep-

resentation has been the mode in which aristocracies have been built on the ruins of popular forums."

Contrary to the claims made by proponents of the constitutional amendment, the President will not be unconstrained in his conduct immediately following a catastrophic terrorist attack. Indeed, the Founders made clear that the President would always be subject to impeachment by the House of Representatives, either a House operating on reduced membership, or a later fully reconstituted House, if the President abused his executive authority at any time.

And of course, no law could be enacted solely by a House operating with only a few Members alone. Further, the issue of incapacitated House Members can be handled by changes to House rules, and the House Rules Committee is already exploring those options.

Demonstrating that this is not a partisan issue, but one concerning the legitimacy of all Members of the House and of the legislation it passes, the House of Representatives, controlled by Democrats and Republicans, has rejected all constitutional amendments authorizing appointed House Members sent to it by the Senate, even during the height of the Cold War.

Today we address House Joint Resolution 83, sponsored by Representative Brian Baird. This proposed constitutional amendment contains all the flaws of amendments allowing the appointment of non-elected Members. It also has some unique additional problems. The amendment would not only override the bill we just passed, but it would forever strip Congress of its authority to expedite special elections in emergencies under its existing constitutional authority.

The amendment requires House Members, prior to taking the oath of office, to submit a list of names to the Governor, so the Governor can draw from them in appointing that Member's replacement. This would subject candidates to endless questions during their campaigns regarding who they placed on the list, creating needless distractions. If a candidate didn't tell the press who was on his or her list, the voters would not have a say on who that candidate's potential replacement should be. Such a list would also invite great mischief, including the placing of names on the list of those owed political favors.

Finally, the amendment also provides that Congress may by law establish criteria for determining whether a Member of the House of Representatives is dead or incapacitated. That provision would deny the House its existing authority, an authority the House Rules Committee is already exercising, to address incapacitation by House rules, and needlessly involving the Senate in how the House operates. By doing so it would unfortunately make addressing continuity in Government more difficult than it already has.

I strongly oppose this amendment, and encourage Members of this Committee to join me in supporting the unbroken tradition of American Government of elected representation in the House.

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I'm happy to be here today, but I wanted to ask you, my colleague from New York, Mr. Nadler, is probably going to try to seek time, and I was wondering

if you are inclined to allow him a few minutes for discussion on this matter.

Chairman SENSENBRENNER. Gentleman from Michigan yield this time to Mr. Nadler?

Mr. CONYERS. That's not what I said.

Mr. NADLER. Point of information? Mr. Chairman, point of information?

Chairman SENSENBRENNER. The procedure that has been utilized in the Committee has been that the Chairman and Ranking Member, whether it's at the full Committee or the Subcommittee, would make opening statements. The Chair then asks unanimous consent that all Members may include opening statements in the record. That has always been granted. Then the bill is open for amendment including motions to strike the last word. And I would hope that that process, which has been successful in the past, could be repeated.

Mr. CONYERS. Thank you very much.

Chairman SENSENBRENNER. The Chair will give——

Mr. NADLER. Point of information, Mr. Chairman?

Chairman SENSENBRENNER. State your point.

Mr. NADLER. Under such a procedure, as Ranking Member of the Constitution Subcommittee, which did not have a hearing or mark-up on this amendment, although it probably should have, if I were to strike the last word for an opening statement, would that preclude me from striking the last word to offer amendments?

Chairman SENSENBRENNER. The gentleman can offer amendments which are subject to the germaneness rule.

Mr. NADLER. After the opening statement?

Chairman SENSENBRENNER. Yes.

Mr. NADLER. Thank you.

Mr. CONYERS. Thank you. I——

Mr. CHABOT. Would the gentleman yield?

Chairman SENSENBRENNER. Time is controlled by the gentleman from Michigan. The Chair will give the gentleman from Michigan, with unanimous consent, another 2 minutes.

Mr. CONYERS. Who is asking that I yield?

Chairman SENSENBRENNER. The gentleman from Ohio, Mr. Chabot.

Mr. CONYERS. Oh, yes, of course.

Mr. CHABOT. By way of clarification, the Subcommittee on the Constitution did have a hearing on the overall issue of congressional continuity which included the concept of a constitutional amendment or statutory changes which we passed recently, so we did actually have a hearing on this issue.

Mr. NADLER. Would the gentleman yield?

Mr. CONYERS. I thank the Subcommittee chair.

Chairman SENSENBRENNER. The time belongs to the gentleman from Michigan.

Mr. CONYERS. What I am thinking, Subcommittee Chair Chabot, is that there was not a hearing on H.J. Res. 83. It was a more generalized one.

Now, this is a troubling proposition, and the procedure before us is troubling as well. I'm going to yield a couple of minutes of my time to my colleague, Jerry Nadler, and I ask unanimous consent that my statement be printed at this point in the record.

Chairman SENSENBRENNER. Without objection, all Members' opening statements may be printed in the record.

Mr. CONYERS. Thank you.

[The prepared statement of Mr. Sensenbrenner follows:]

PREPARED STATEMENT OF THE HONORABLE F. JAMES SENSENBRENNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

The debate over constitutional amendments that allow appointed House Members in the wake of mass vacancies caused by a terrorist attack is a debate between those who would preserve a House of Representatives elected by the People, and those who would deny the right to elected representation during the most crucial moments of American history and allow rule by an appointed aristocracy that owes its allegiance not to the people, but to those doing the appointing.

Let us be clear. Any constitutional amendment denying the right to elected representation would accomplish what no terrorist could, namely striking a fatal blow to what has otherwise always been "The People's House." The House—*unlike* the Presidency and the Senate and unique among all branches and bodies of the entire federal government—is the only branch institutionally designed to always reflect the popular will through the legislation it passes.

When terrorists attacked on September 11, 2001, it was an *elected*—not an appointed—Congress that acted in its wake, and the legislation passed by that elected Congress has a legitimacy that legislation passed by an appointed Congress would not have had. All of Congress' powers under Article I of the Constitution are only legitimately exercised by an elected House of Representatives.

H.R. 2844, the Continuity in Representation Act, which passed the House two weeks ago on an overwhelming bipartisan vote of 306–97 (with more Democrats voting for it than against it), will ensure that the House is repopulated by legitimate democratic means within a maximum of 45 days after an attack causes mass vacancies in the House. Within those 45 days, any constitutional amendment that allowed rule by appointed Members would pose far more risks than benefits, and legislation passed by an appointed House that did not comport with the people's will would have to be repealed by a later elected House, leading to further discontinuity at the very time continuity is most important.

The Founders explicitly *rejected* the proposition that the appointment of Members is compatible with the American Republic. James Madison wrote that "it is *particularly essential* that the [House] should have an immediate dependence on, and an intimate sympathy with, the people" and that "elections are *unquestionably the only policy* by which this dependence and sympathy can be effectually secured." And as Madison stated in his speech to the Constitutional Convention, "A gradual abridgement of" the right to elected representation "has been the mode in which Aristocracies have been built on the ruins of popular forms."

Contrary to the claim made by proponents of constitutional amendments, the President would *not* be unconstrained in his conduct immediately following a catastrophic terrorist attack. Indeed, the Founders made clear that the President would always be subject to impeachment by the House of Representatives—either a House operating on reduced membership, or a later fully reconstituted House—if the President abused executive authority at any time.

And of course, no law could be enacted solely by a House operating with only a few Members alone. Further, the issue of incapacitated House Members can be handled by changes to House Rules, and the House Rules Committee is already exploring those options.

Demonstrating this is not a partisan issue, but one concerning the legitimacy of all Members of the House and of the legislation it passes, the House of Representatives, controlled by both Democrats and Republicans, has rejected all constitutional amendments authorizing appointed House Members sent to it by the Senate, even during the height of the cold war.

Today we address H.J. Res. 83, sponsored by Rep. Brian Baird. This proposed constitutional amendment contains all the flaws of amendments allowing the appointment of non-elected Members. It also has some unique additional problems.

Rep. Baird's amendment not only would override H.R. 2844, which already passed the House on an overwhelming bipartisan vote, but it would forever strip Congress of its authority to expedite special elections in emergencies under its existing constitutional authority.

The amendment requires House Members, prior to taking the oath of office, to submit a list of names to the Governor that the Governor can draw from in appointing that Member's replacement. This would subject candidates to endless questions

during their campaigns regarding who they placed on the list, creating needless distractions. If a candidate did not tell the press who was on his or her list, the voters would not have any say on who the candidate's potential replacements should be. Such a list would also invite great mischief, including the placing of names on the list of those owed political favors.

Finally, Rep. Baird's proposed amendment also provides that "Congress may by law establish the criteria for determining whether a Member of the House of Representatives or Senate is dead or incapacitated. . . ." This provision would deny the House its existing authority—an authority the House Rules Committee is already exercising—to address incapacitation by House Rules, and needlessly involve the Senate in how the House operates. By doing so, it would unfortunately make addressing continuity in government more difficult than it already is.

I strongly oppose this amendment, and encourage all Members of this Committee to join me in supporting the unbroken American tradition of elected representation.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

I believe that it is premature for the Committee to take up a constitutional amendment on the very serious issue of continuity in congress as a result of a terrorist attack. I cosponsored and voted for the Chairman's statutory response to this matter two weeks ago. While that response is not mutually exclusive to a constitutional amendment, in my judgment we need a lot more information and views on the range of possible constitutional amendments before we proceed.

The Baird amendment has many salutary aspects. It provides for an immediate and seamless process of picking congressional successors. As such, it would allow this body to continue quite quickly and insure that the framers visions of constitutional checks and balances was observed. There are many, many ways to do this, and the Baird amendment represents merely one option—through temporary appointments based on a list of nominees provided by the deceased member. Other Members including our colleague Zoe Lofgren have also weighed in with constitutional amendments.

The problem with these amendments, of course, is that they would protect our prerogatives at the expense of the democratic process, albeit temporarily. If we are going to take a dramatic step like this, I would like a lot more input before we vote.

While the Committee did hold hearings last Congress on H. Res. 67, introduced by Rep. Baird,, we have had no hearings on his proposal this Congress. Moreover, Rep. Baird's proposal has changed and several other constitutional amendments on the issue of continuity have been introduced. None of these have been subject to hearings.

Absent such a process, it will be difficult for me to support a constitutional amendment at this time.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

In Federalist No. 57 James Madison wrote, "If we consider the situation of the men on whom the free suffrages of their fellow citizens may confer the representative trust, we shall find it involving every security which can be devised or desired for their fidelity to their constituents."

Simply stated we, as Representatives, owe our fidelity and allegiances to our constituents. They are the people who have the right to vote. They are the people who believe we should manage the laws of this nation. And they are the people who should possess the sole ability to send us to this august body.

Any abridgement on the ability of our constituents to have a voice electing who shall represent them is a direct assault on what is stated in Article 1 Section 2 of the Constitution. This article simply states that the PEOPLE of the several states shall choose the Members of the House. It is simple and direct and should not be infringed upon.

In front of us today are a number of Constitutional Amendments, even though the House has already spoken on this issue in the overwhelming bipartisan passage of H.R. 2844. All of these amendments focus on how to repopulate the House through appointments in case we ever have to live through a catastrophic attack. However, during a time of crisis, it is all the more important to have Representatives accountable to the people; thus, elected by the people.

The Former Speaker of the House, Tip O'Neill will always be remembered for his aphorism "All Politics Is Local." This phrase reminds us that we are the sole proprietors of the wishes of our constituents. By doing away with our constituencies even if it is for a temporary basis does this nation a grave injustice. Therefore, the debate on how to reconstitute the House should never turn on who has the appointment power. Because the appointment power rests in our constituency and shall remain that way as long as I have a vote.

When Chairman David Dreier testified before the House Administration Committee he quoted former Senator John Stennis. Stennis stated,

> "I believe it is one of the great heritages of the House of Representatives that no person has ever taken a seat or cast a vote in that body except by virtue of election by the people. That is a great pillar of our form of government . . ."

These are words I cherish as a Member of the House. I thank the Chairman and yield back the balance of my time.

Mr. CONYERS. Now, Brian Baird, I think it should be made clear, has been working on this question of continuity before 9/11, and I think that this accounts for the tremendous concern and zeal that he brings to the subject. He's been working on it long before we all collectively recognize that this problem has to be attended to, and I want to thank him for that. And his amendment does have salutary aspects. But the fact that we have not had, to my understanding, a hearing in the Subcommittee, chaired by Mr. Chabot and the Ranking Member, the gentleman from New York, Mr. Nadler, leaves me troubled here. And so I'm going to find it difficult to support an amendment for which I am, frankly, inadequately prepared to deal with, a constitutional amendment. So I take this as a very serious matter.

And I would now turn to my friend from New York, and he will have the balance of my time.

Mr. NADLER. Thank you. I thank the gentleman for yielding.

Mr. Chairman, I don't think this amendment is a perfect amendment, although I do applaud its spirit, and if I have time, will offer a number of amendments to it. I think it goes in the right direction.

I think the remarks of the Chairman—before I get to that, let me just say, first of all, I think our procedure is wholly wrong. This is a very serious matter. The Committee in the last—or the Subcommittee in the last Congress had one brief hearing on the general topic, did not discuss in detail any particular proposed amendment, not to mention the several proposed amendments that have been offered. The House passed a bill on this topic without any consideration, any detailed consideration by the Committee or the Subcommittee.

This is the kind of problem which frankly we ought to have a detailed hearing on. We ought to draft an amendment. That amendment ought to then be sent to the law schools, the various commentators, the newspapers. We ought to have several weeks, perhaps a month or two for comment. Then we ought to reconsider it. Then we ought to bring it up in Committee to consider, not a hasty hearing on—a hasty markup on this amendment with no hearing on this amendment, on this text, no opportunity in the Subcommittee for discussion and amendment. I think it's just irresponsible frankly.

Second of all, while the sentiments voiced by the Chairman about election to the people's House are admirable, the fact is that in the event of a catastrophe, the House must function right away. The bill we passed says that every State shall hold an election within

45 days. I daresay the laws of most States won't permit that, and to do an election within 45 days, how do you do the circulation of petitions, a primary election and a general election including military ballots and absentee ballots in 45 days?

I think the better approach would be something along the lines of this amendment. I would change it if we had a real opportunity to consider it, to say that there ought to be two stages, one mandate that there be an election within a reasonable period, say 120 days or 180 days, and say that in that interim period, only for 120 or 180 days, not for the balance of the Congress unless the balance of the Congress is less than 120 days, there should be an appointed Member from a list submitted by the Member in rank order——

Chairman SENSENBRENNER. The time of the gentleman from Michigan has expired. Are there amendments?

Mr. CHABOT. Mr. Chairman?

Chairman SENSENBRENNER. Gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman.

When one reads our Nation's founding documents, it soon becomes clear that the right to elected representation was the very core of its significance and lasting value. No constitutional amendment that allows appointed representatives would be consistent with the very essence of our Nation's reason for being, and for that reason I oppose such amendments including this one.

James Madison wrote in Federalist No. 57, quote, "Who are to be the electors of the Federal Representatives? Not the rich more than the poor, not the learned more than the ignorant, not the haughty airs of distinguished names more than the humble sons of obscurity and unpropitious fortune," unquote.

Constitutional amendments that would allow appointed Members would deny that sacred heritage. At the Constitutional Convention, according to the notes taken by James Madison, Delegate George Mason argued "strongly for an election of the larger branch by the people. It was to be the grand depository of the democratic principle of the Government. It was, so to speak, to be our House of Commons. It ought to know and sympathize with every part of the community, and ought therefore to be taken not only from different parts of the whole Republic, but also from different districts of the larger members of it."

It was arguments such as these that won the day when our Constitution was drafted. Constitutional amendments that would allow appointed Members would violate those principles the Founders believed were most important and on which they staked their lives and their fortunes. And James Wilson, at the Constitutional Convention, according to Madison's notes, quote, "contended strenuously for drawing the most numerous branch of the legislature immediately from the people. He was for raising the Federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible," unquote.

H.R. 2844, which I cosponsored and which passed just recently in the House by an overwhelmingly bipartisan basis—it was 306 to 97—preserves Americans' essential right to elected representation. This amendment would override H.R. 2844, again, which passed

overwhelmingly by a bipartisan vote, and deny the core of America's founding principles. For that reason, I strongly oppose it.

I yield back the balance of my time.

Ms. LOFGREN. Mr. Chairman?

Mr. NADLER. Mr. Chairman?

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler, the Ranking Member——

Mr. NADLER. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. NADLER. Mr. Chairman, to finish my opening statement, no one denies the principle that the House ought to consist of elected people, but in the event of a catastrophe when action is immediately necessary perhaps, maybe there's no President, maybe there's no Cabinet, maybe the House has to choose somebody, and it won't wait 45 days or more, probably 100 days, for an election. We must provide for continuity in the event of a catastrophe.

I would think that an appointed person, not with discretion by the Chief Executive. I would have each Member have a secret list handed to the Clerk of the House in ranked order, and have that appointee limited to the 45 or 50 days or 100 days till you can have an election. That might be a better idea, but we ought to consider these ideas, not summarily reject them on the grounds of high principle when we haven't had adequate hearings.

I think Mr. Baird has done an admirable job of coming up with a basic idea. I think it needs modification. I would limit the time that this individual could serve. I would say that if this individual were a member of a lower legislative body, a State legislature, he would not have to give up his or her seat in that body unless elected to a longer term, and I would limit the whole thing to 120 days or whenever till you could hold an election. But you have to give a reasonable time for an election, especially if after a catastrophe, there are chaotic circumstances. It's very unlikely you're going to be able to hold an election in 45 days when everybody's trying to rescue the survivors and bury the dead.

So I think we have to consider this much more seriously than we've considered it, instead of passing a hasty bill that, frankly, makes no sense because it's impossible to accomplish in the 45-day time period, and summarily rejecting everything on the grounds of high principle. We ought to look into this carefully. We ought to have a number of hearings in the Subcommittee and do this properly, and I would object to the—I would oppose the motion to report unfavorably because I think it's unfair to the sponsor. I think it's unfair to the subject. I think it's unfair to the American people who deserve careful consideration of what we could do to preserve continuity of elected representative governments in the event, God forbid, of a catastrophe.

Thank you. I yield back.

Chairman SENSENBRENNER. Gentleman from Texas.

Mr. SMITH. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. SMITH. Mr. Chairman, article I, section 2 of our Constitution states, quote, "The House of Representatives shall be composed of

Members chosen by the people of the several States. When vacancies happen in a representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies," end quote.

The Constitution emphasizes the right of the people to elect their representatives. I don't think, Mr. Chairman, we can quote the Constitution too often, and I don't think we can ignore it. The right of the people to govern themselves through elected representatives should be continued. The House of Representatives has always been elected by the people. The constitutional amendment we are considering today, introduced by Congressman Baird, would create unelected representatives. During a national crisis the American people would be better served and would be reassured knowing that they are governed by elected representatives, not appointees.

By allowing for the election of representatives rather than their appointment, Americans will know that their Government is legitimate.

The House recently passed H.R. 2844, Mr. Chairman, your bill, which requires special elections to occur within 45 days of a disaster that kills more than 100 Members of Congress. Well, some wonder how the Government would operate while we are waiting for these elections. There is already a House rule that provides that a quorum shall consist of Members who are living. During a time of disaster when many Members have died, the Speaker can adjust the required quorum to reflect the number of Members still living. Furthermore, the trend of history is toward election of Members, not away from it.

In 1913 the 17th Amendment to the Constitution provided that the people of each State shall directly elect their Senators. Previously, Senators were chosen by State legislators. However, Senate vacancies are filled by the Governor of the affected State. So imagine a scenario in which a significant number of House and Senate Members are killed during an attack. Senators would be appointed. If we passed a resolution allowing for House Members to be appointed as well, we could have a Congress of mostly unelected officials. At a minimum we must preserve the right of the American people to have elected representatives in the House.

Some claim that a constitutional amendment providing for the immediate appointment of representatives is necessary for a functional Government. However, Congress has granted the President significant powers to act during an emergency. He could maintain the necessary functions of Government along with a Congress utilizing a reduced quorum until elections are held.

For these reasons, Mr. Chairman, I do not support any constitutional amendment that would deprive the American people of the right to elect their representatives.

I will yield back to balance of my time.

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. The gentlewoman from California, for what purpose do you seek recognition?

Ms. LOFGREN. To strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. LOFGREN. Mr. Chairman, 2 weeks ago the House passed your bill, H.R. 2844 to accelerate elections in the case of the kind of dis-

aster we are discussing. I voted for that bill because I think it is an important first step to address how the House would function in the event of a complete catastrophe. However, there's a more basic issue which is what would we do as a country if the Congress, if the House did not exist for the 45 days between the disaster and the time your bill would become effective?

Without a House, there's no Congress, and what I envision is in that circumstance the Executive would have to assume the powers of a dictator in order to respond to the emergency, a result that none of us would wish.

I have introduced a constitutional amendment that takes a different approach from Congressman Baird's. It would provide that in the event of a 30 percent vacancy because of a catastrophe, that the House could, by a two-thirds vote, provide by statute for a way to temporarily appoint Members until these special elections could kick in. Congressman John Larson and Congressman Dana Rohrabacher have also introduced amendments. Each of the amendments I think are thoughtful. Personally, I think almost all have merit. None of them are quite ready to be adopted. All of them require additional study. While we did have a hearing in the 107th Congress on an amendment by Mr. Baird, we haven't had hearings on any of the other amendments that have been introduced on this subject. We have had a distinguished commission that included former Speakers Foley and Speaker Gingrich, as well as Lloyd Cutler and former Senator Alan Simpson, and they all ended up after study favoring a constitutional amendment.

I'm not suggesting that we should simply accept their recommendations, but it seems to me at the very least we should consider and evaluate their findings before we cast a vote.

Today we're being asked to markup and amendment and we've not even had a hearing on the amendment. Let's look at the history of this Committee. For the constitutional amendment to protect the rights of victims, we had hearings in the 108th, 107th, 106th, 105th and 104th Congresses. For the amendment to prohibit flag burning we had hearings on the 108th, 106th, 105th and 104th. In the amendment to limit the Federal Government's ability to raise taxes, we had hearings in the 105th and 104th Congress, and I would say here in the 108th we have had five hearings already on the proposal to amend the Constitution relative to same sex marriages. It seems to me that this Committee owes it to the country and the Congress to at least hold hearings on this subject. It seems to me, and I would propose at the appropriate time, that the Committee should postpone consideration of this amendment for at least 2 weeks. The extra time would allow the Committee to schedule a hearing on the issue. We could hear from scholars. We could hear from statesmen. We could hear from the commission that spent so much time studying this, and we would be able to discharge our responsibilities relative to the constitutional amendments that have been proposed in a way that is more informed and more thoughtful.

I would note also that we have heard quoted with great affection here today and also on the floor 2 weeks ago, Madison, talking about the need to have an elected House of Representatives. No one disagrees with that. I would note, however, that those comments made by Madison was in contrast to the appointed nature

of the Senate at the time, and I don't believe that Madison would have the same attitude towards a 2-month appointment followed by an election of permanent Members to avoid the dictatorship of the President. I would note also I was somewhat surprised, and I don't know if it's accurate, it was just a newspaper report—that the Majority Leader of the House, Mr. Delay, actually says that he thought the 17th Amendment was a mistake and that we ought to go back to the appointment of Senators. So hopefully we will not see an amendment to accomplish that.

With that, I would yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Mr. Chairman, move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. COBLE. Mr. Chairman and colleagues, this issue, it seems to me, has been generously laced with bipartisanship from the outset. As has been pointed out by the distinguished gentleman from Ohio and the distinguished lady from California, a hearing was conducted, but in addition to the hearing, I think I'm correct when I say that there was a working group that thoroughly studied every aspect of this issue, and that working group, I believe, was headed by the gentleman from California, Mr. Cox, and the gentleman from Texas, Mr. Frost. So I think it has certainly been ventilated with open air surrounding the issue from the outset.

Now, Ms. Lofgren, Mr. Baird, the gentleman from Washington and my friend, Mr. Rohrabacher, the gentleman from California, Mr. Larson, they all have bills that provide for appointment. Now, we can disagree agreeably about this, but the gentleman from Texas, Mr. Smith, pretty thoroughly touched on it as did Mr. Chabot. I think there's no substitute for elected officials in this body.

Now, the Chairman pointed out in his opening statement, unlike the other body, no one attains membership in the United States House of Representatives but by election. You don't get appointed to the people's House.

I recall going back home to my district sometime ago, Mr. Chairman, and one of the Members of the House had died. And a high school student said to me, I wonder if the Governor will appoint whom? And another high school student said, Oh, no, not to the House. You don't gain admission to the House through appointment. And I was impressed that here was a high school kid who knew that. Many folks don't know it. Now, Mr. Chairman, I may be overreaching when I make this next statement, but another feature that bothers me about appointments to the house is this fact. As we all know, there is no requirement that insists that a Member of the House reside in his or her district that he or she represents.

I have the possible fear that appointments might abuse that process. Now, there may well be Members who serve today who don't reside in their districts that they represent, but I would say there are very few, because I think when a person declares his candidacy he is going to assume a very severe risk, it seems to me, if he does not reside within the confines——

Mr. WEINER. Would the gentleman yield on that point?

Mr. COBLE. Not just yet. If he does not reside within the confines of the district that he serves. As I say, I may be missing the mark here and I may be overly sensitive about this, but I can see the possibility of an appointment resulting in perhaps that being abused, and perhaps certain geographic districts being ignored because the appointing authority may have a friend who lives here, there or yonder. I hope I am wrong about that, but I think that may be a point worthy of consideration.

Mr. WEINER. Would the gentleman yield on that point?

Mr. COBLE. The gentleman from New York, I'll yield to.

Mr. WEINER. I frankly agree with your concerns on that, which is exactly the argument for having a detailed hearing on the Baird bill, and I was wondering if you would see anything wrong with fleshing out that issue. It's a concern that I share as well and perhaps having a hearing on the bill would give us an opportunity to hear from experts.

Chairman SENSENBRENNER. Will the gentleman yield to me?

Mr. COBLE. I will yield to the Chairman.

Chairman SENSENBRENNER. I thank the gentleman from North Carolina for yielding. I am somewhat puzzled and maybe a bit amused at all of these calls for having a hearing. The author of this resolution, Mr. Baird, filed a discharge petition on April 20, asking that his bill be brought directly to the floor without any Committee consideration. When the continuity of Congress bill came up, I made representations several times on the floor of the House that the gentleman from Washington's constitutional amendment would be the first order of business at the next markup that the Judiciary Committee had. Nobody stood up on the floor and said that was a bad idea, that was rushing the matter through. And we're having this markup today in response to the commitment that I made to the entire House of Representatives that we would be having a markup on House Joint Resolution 83.

Ms. LOFGREN. Would the gentleman yield?

Mr. COBLE. It is my time and I think it is about to expire. I will yield to the lady till the red light comes on.

Ms. LOFGREN. I would just note that I have not filed a discharge petition for my constitutional amendment, nor have I signed the discharge petition, and I think we should have a hearing on all the amendments that have been introduced on this subject.

Mr. COBLE. I reclaim my time and yield——

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I have a lot of different emotions floating around and I'll try to bring them together if I can.

First of all, I want to compliment the Chairman on the conduct of the bill, his bill that went to the floor, and the debate that took place. I want to especially compliment one phrase or sentence that he stated on the floor, so that we can try to get this back in some perspective.

The Chairman went out of his way to make it clear that this should not be, is not a partisan issue. And I would think that it would not serve any of us well to try to make this debate a partisan debate, and I'm beginning to get the feeling, hearing people

speak on both sides of what we are doing here, that that could happen easily, and I think it would be a detriment.

I think the American people deserve to hear us consider issues of this magnitude, and debate them and evaluate them, and I think the passage of the Chairman's bill on the floor of the House, which I ultimately did vote for despite a number of reservations that I had about the content on the bill, on the theory that there really is no resolution to this issue that I am going to be completely comfortable with, but the passage of the Chairman's bill on the House floor actually takes some pressure I think off of us to rush to a judgment on what may be other possible solutions to this problem.

I have been, probably more than most people on this Committee, very reluctant to entertain the notion of amending the Constitution. I think the Constitution is, to the extent that we can keep it sacrosanct, we should keep it sacrosanct. So it would be delightful to me if we could find a resolution to this problem short of amending our Constitution, but I don't think the Chairman's bill really does that, at least not for a 45-day window after a catastrophe occurs. You've got a House of Representatives that could continue to be in limbo, and if you take seriously the motion to recommit, which was passed with the Chairman's consent, that 45-day period could in a number of cases become 90 days or much longer to comply with all of the other requirements that exist in the law.

I think this is one of those situations that really cries out for deliberation not only about Mr. Baird's proposal but about the whole range of proposals that are out there, because I think every single one of these proposals is going to cause some discomfort to us, and there will be no perfect solution to this problem. It will be a matter of judgment, and the more we know about the issue, the more likely it is we are able to exercise that judgment in a responsible way and in a way that the public will perceive that we have dealt with this issue in a nonpartisan, thoughtful way. I think it is a mistake to proceed with the markup of this bill without considering all of the proposals that are out there and having hearings on them.

With that, I will yield back, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from Indiana, Mr. Hostettler.

Mr. HOSTETTLER. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. HOSTETTLER. Thank you, Mr. Chairman.

Mr. Chairman, I believe it is of the utmost importance that the House of Representatives remain an elected body, regardless of the circumstances surrounding the election of those representatives.

It is indeed an unhappy task to discuss the possibly tragic scenarios that might result in a large section of the House needing to be replaced. However, it is even worse to think that in such a chaotic time that we would be without means by which to reelect this body.

Previously, Mr. Chairman, as you said, this body overwhelmingly passed H.R. 2844, the "Continuity in Representation Act," which would provide for special elections if vacancies in the House of Representatives exceed 100 Members. H.R. 2844 would ensure that this body remains an elected body instead of merely an appointed one.

There are some who would argue that that point is not very important, but consider a quote from Justice Joseph Story as he explained why the colonists decided that the House should be an elected representative body in his book entitled "A Familiar Exposition of the Constitution of the United States." Quote: "Their own experience as colonists, as well as the experience of the parent country and the general deductions of the theory had settled it as a fundamental principle of free Government, and especially of a Republican Government, that no laws ought to be passed without the consent of the people through representatives immediately chosen by and responsible to them," end quote.

Without a House of Representatives directly elected by the people in a national emergency, all three branches of Government would become appointed rather than elected officials. We must retain at least one part of the Federal Government that is accountable to the people. For this reason, I urge my colleagues to oppose H.J. Res. 83, and maintain a House of Representatives that will be the voice of its constituency.

Yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff.

Mr. SCHIFF. Thank you, Mr. Chairman.

As I've watched the debate over this proposal over the last couple months I've wondered how we got onto this partisan track, and perhaps more importantly, how do we get off of it? In May 2003, the Continuity of Government Commission issued a report with many recommendations.

I, for one, and I think a great many Members of this Committee, would like to have a hearing with that commission, a bipartisan commission, and hear from them directly about their report, why they reached the conclusions they did, what options they laid out, whether we should consider some of the options they put forward. And yet, we don't seem able to do that. I'm perplexed by the lack of time to do that when I'm on the Subcommittee that had a hearing on this a couple years ago. We've had two hearings out of five scheduled hearings on gay marriage in that Subcommittee. We have time for five hearings in that Subcommittee on the gay marriage amendment, but we don't have time for one hearing on this May 2003 Continuity of Government Commission report.

This is, as it's been observed by many people, the quintessentially nonpartisan issue. If we are obliterated, if the Congress is obliterated by terrorists, we are all going to be equally targets. The Democrats are no more targets than the Republicans. There is no way to discern a partisan advantage in this legislation. There is none.

We all agree that the election of House Members is an attribute of this House that we cherish. That's not dispute, and those that would quote the framers of the Constitution or other writers on the Constitution celebrating that. We all agree with that.

There is only one very narrow issue here, and that narrow issue is who will govern? Who will represent the country in the Congress until the elections? It's not a question of us doing away with the elections. No one is proposing that. It's just a question of what do we do in that narrow interval of time after calamity before the elections. Do we have a Congress that is either unable to function for

45 days or 90 days until we have special elections? Do we have an appointed Congress that would satisfy that function? Do we want to investigate appointments from a list, as Mr. Baird has offered in his amendment? Do we want to give the Governor the power to appoint? Do we want to impose a requirement that those that are appointed for the interim could not run in the election that would follow; is that desirable, or is that undesirable?

These are all I think very legitimate questions many of us would like to pose to the commission Members that have studied this issue, but none of us will get the opportunity to.

Justices in the past have made the observation that the Constitution is not a suicide pact. Justice Jackson wrote: There's a danger that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

The same can be said for the Congress. If we don't temper some of our doctrinaire logic with a little practical wisdom, we can convert this constitutional provision into a suicide pact. There's no need for that. And there can be a very legitimate and bipartisan debate and difference of opinion over what ought to happen in those 45 or 90 days. But there's obviously a great deal of interest in having a further discussion on this issue. There's no need to rush to a determination of Mr. Baird's bill or the bill that we had last week.

In the interest of comity between the parties on an issue that is quintessentially nonpartisan, I would just like to make one final appeal that we have an oversight hearing of this issue, that we bring the commission, that we have the chance to air our concerns and form our opinions, and that we have the chance to craft a further provision. It may look exactly like Mr. Baird's. It may look very different, but that we bring to this the kind of nonpartisan and even-keeled attention that the American people would have us bring to the problem.

I yield back the balance of my time.

Chairman SENSENBRENNER. Gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOODLATTE. I thank the Chairman.

Mr. Chairman, I arise in opposition to this resolution, and do so for the reasons cited by Mr. Chabot, Mr. Smith, the Chairman and others. This is the people's House. The direct election of Members of this body by the people is a very, very important principle established from the founding of our Constitution. I recognize that there are situations in which this institution could be badly damaged and disrupted. I think the Chairman's legislation, which passed the House of Representatives by a very strong margin, addresses most of those concerns. There will be ongoing discussions about particular scenarios in which that might not meet all the needs, but I haven't seen any constitutional amendment that both preserves the direct election of Members of this body and doesn't allay my concerns about the alternatives that are put forward.

I am deeply concerned about the idea that every Member of this House would designate two or more other people to be effectively shadow Members of the Congress under very dark and foreboding circumstances. I am deeply concerned that if one of them were subsequently selected to fill a position, they would then have a substantial leg up over anybody else that the people that our Constitution clearly intended to have the final say, the people, would be disadvantaged by that individual in a time of crisis, having been appointed and thereby not having the opportunity to be elected. And this discussion and this debate can and should go on.

But I don't understand the comments of a number on the other side. I particularly am concerned about the comments of the gentleman from California, who I see is perhaps—he's over there I guess—the gentleman from California, Mr. Schiff, who just said a few minutes ago there's no need to rush to decision on Mr. Baird's bill, and yet he has signed a discharge petition which is a complete rush to decision on Mr. Baird's bill. It is effectively removing any opportunity for further discussion, further examination of what might be an opportunity to do something in the future.

We're not in a position at this point in time to take action. I don't foresee any of the amendments having anywhere near the kind of consensus that's needed to get a two-thirds vote in the House, a two-thirds vote in the Senate and three-quarters of the State legislatures to ratify it, and I will vote against this one for the particular concerns that I expressed.

But I would say to those who have signed a discharge petition, why circumvent the process that you're now advocating take place? Because it certainly could not take place. We certainly could not go to a more deliberative approach on any of these amendments if indeed a discharge petition were to be successful and the matter were to bypass the Committee entirely, go straight to the floor for an up or down vote.

So I urge my colleagues to oppose this joint resolution, and yield back the balance of my time.

Chairman SENSENBRENNER. Are there amendments? The gentleman from New York. Are there amendments?

Mr. NADLER. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.J. Res. 83, offered by Mr. Nadler. On page 2, beginning on line 5: strike "chief executive of the State from which the individual is elected" and insert——

Ms. JACKSON LEE. Mr. Chairman, I'd like to be able to speak on this because I was trying to strike the last word.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. On page 2, line 6: insert "ranked" before "list."

On page 2, line 10: strike "two" and insert "three."

On page 2, beginning on line 22, strike "chief executive" and all that follows through "that time." And on line 24, and insert "Clerk of the House."

On page 3, line 1, strike——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read. The gentleman from New York is recognized for 5 minutes.

[The amendment follows:]

Amendment Offered by Mr. Nadler of New York
To H.J. Res. 83
May 5, 2004

On Page 2, beginning on line 5; strike "chief executive of the State from which the individual is elected" and insert: "Clerk of the House".

On Page 2, line 6: insert "ranked" before "list"

On page 2, line 10: strike "two" and insert "three".

On page 2, beginning on line 22, strike "chief executive" and all that follows through "that time" on line 24, and insert "Clerk of the House".

On page 3, line 1, strike "chief executive" and insert "Clerk of the House".

On page 3, line 10, strike "at such time and" and insert "within 120 days after the vacancy occurs".

On page three, insert after line 4, insert:

"Sec. 4. No law passed by a Congress in which the House of Representatives consists of a majority of Representatives appointed from a list shall be valid after 120 days following an election held under section 2 of this Article unless it is adopted by a House of Representatives consisting only of elected representatives."

Renumber "Section 4" as "Section 5".

Mr. NADLER. Thank you, Mr. Speaker—excuse me, Mr. Chairman.

Mr. Chairman, as I said in my opening remarks, I think that we are rushing to this, and we should much more carefully consider this. This amendment, which really should be a series of amendments, essentially makes a few changes. One, it says that for a time period after a catastrophe where the majority of the Members of the House are incapacitated or no longer among the living, that the Clerk of the House, not the State Governors, would select someone from a ranked order list, that everyone, when elected to the House, would give in a list of at least three numbers—of at least three names in ranked order, which would say, in the event of my death or incapacitation appoint A. If he's not available or she, appoint B. If he or she is not available, appoint C. So no appointed executive is making a choice. Presumably that list would reflect the same qualities and political philosophy as the elected Member whom the voters elected.

Secondly, it would say that every State must have an election within 120 days, which I think is more realistic than 45 days, and these appointees can only last for that 120 days. So you're limiting the appointments.

And third, it would say that any law passed by Congress during the period when these appointed representatives are serving, are no longer valid 120 days after the replacement elections unless the elected House has reaffirmed them. So what we're saying is we're

going to have a little flexibility in the event of a catastrophe. In order to put the House together immediately, you have a ranked order list submitted by each Member to the Clerk of the House, who selects an appointee in ranked order. Those people can serve no more than 120 days. Within 120 days, or as soon as the States, according to their procedures, can have an election, they have an election. And anything the House did in that interim period can only last another 120 days unless reaffirmed by a totally elected House.

So you're preserving the idea that laws are made by the elected House, but a House elected by the people, but you're giving the ability in the event of an unimaginable catastrophe for immediate action before the election, and you're giving the States 120 days rather than 45 days to hold an election, which enables them to hold primaries, enables people to have absentee and military ballots, enables there to be a real campaign. I mean how can you have a campaign with petitions and everything else in 45 days so the voters can choose anybody, especially in a period of chaos after an election.

So I think that this preserves—that Mr. Baird's amendment, as modified by this amendment, would preserve the best qualities of the elected legislature, namely that within 120 days it's completed elected again, that nothing permanent can be done until it is elected again, but that in the immediate aftermath of the catastrophe you can have appointed Members, but appointed by the deceased Members, someone who would represent the viewpoints and the philosophies of the person the voters elected. You're not giving a chief executive a choice of anybody. It's a ranked order list by the deceased House Member. But they can only act for 120 days.

So I urge the adoption of this amendment to make overall amendment better represent both the philosophy of speed and emergency action that we've been talking about and of election that the Chairman has been talking about. And I hope really that this would show that there is not such a divide amongst us on that Committee, and that we can fashion ways—if we gave all of us time to consider it, we can fashion ways in which to give the country the flexibility to survive a catastrophe with the continuity of Government without sacrificing the principle of an elected House of Representatives.

Ms. LOFGREN. Would the gentleman yield?

Mr. NADLER. Yes, I will.

Ms. LOFGREN. Just a brief comment. I think that this is an honorable effort to come up with alternatives, but I think it proves the point that we ought to have hearings, more than that we ought accept the amendment.

Mr. NADLER. I agree.

Ms. LOFGREN. I think that to sit here and try and craft something as serious as this on the fly instead of hearing from Speaker Gingrich and Speaker Foley, instead of having the scholars come in. I think it's just an exercise in futility, and perhaps the gentleman should introduce his amendment as a constitutional amendment, and we can add to the number of proposals that will be reviewed if we——

Mr. NADLER. Reclaiming my time, I completely agree with the gentlelady from California. I will consider doing that, but I offer

this now, knowing that this Committee is being railroaded, to show the kinds of things that we ought to be considering, the kinds of things we ought to have hearings about, and the fact that we're not really that divided amongst us. We all agree on an elected House of Representatives. I think we all agree that we ought to be able to function in the aftermath of a catastrophe and——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. NADLER.—why this is a partisan issue is beyond me. Thank you.

Ms. JACKSON LEE. I'd like to strike the last word.

Chairman SENSENBRENNER. The Chair recognizes himself for 5 minutes in opposition to the amendment.

This amendment, while it might appear to be cosmetic, still keeps many of the bad features of the original amendment that has been introduced by Mr. Baird, and in some cases makes it worse.

First of all, it still preserves the feature that Members may designate their own successors. I think that that brings this into an issue in the campaign. If a list is filed immediately before the swearing in of a Member-elect, that Member-elect, instead of having the first story in his service in Congress be a celebration of him being elected, the press will be all over him on who he has designated as a temporary successor. I don't think that is in the keeping of why people get elected to the House of Representatives to begin with.

Secondly, the amendment removes from the Governor of the State, who after all is an elected official, the appointment authority invested in the Clerk of the House, who is an official that is designated by the majority party in the House of Representatives to act as the administrative and clerk of the records of the House of Representatives. So instead of having a governor making the selection, we end up having the Clerk of the House doing that.

I think the biggest flaw of the amendment offered by the gentleman from New York is that it extends by 75 days the amount of time where an appointed House can sit beyond that which is in H.R. 2844. The underlying text of the amendment takes away the powers in article I, section 4 of the Constitution of Congress in emergency situations to set election time and sets the arbitrary time of 120 days. There are many States that are able to fill vacancies by special election much quicker than that. If we have an arbitrary time of 120 days, the States that act more quickly will end up having elected representatives come to Washington. The States that act more slowly will continue to have appointees sitting in the House of Representatives. That opens up another Pandora's box that I think is best shut by voting down this amendment.

Ms. JACKSON LEE. I would like to speak to the amendment.

Chairman SENSENBRENNER. The gentlewoman from Texas.

Ms. JACKSON LEE. Strike the last word.

Chairman SENSENBRENNER. The gentlewoman's recognized for 5 minutes.

Ms. JACKSON LEE. Let me first of all acknowledge the credible attempt to give Mr. Baird a full hearing by way of this markup, and the amendment that is before us. Certainly the effort is to ensure that we recognize the potential catastrophe which we face.

But just as in the 1980's when 265 plus sleeping military personnel lost their lives in Lebanon by a single act of terrorism, I think we have to realize that as we engage in our business here in the United States Congress, that single act of terrorism can occur. And for some reason it appears that the very Committee of which is supposed to be a guiding force behind constitutional protections, is not focused in sincerity or seriously about the need to conduct hearings to determine the best approach.

The reason Mr. Baird is forced into a discharge petition is because he simply wants a full and open hearing to design a right road map, which in the instance of his recommendation is a constitutional amendment, for how we deal with the Lebanon tragedy or the Lebanon terrorist act, when 265 died in their sleep, as 435 or 535 might die as they are convened on the floor of the Senate or the House.

So it seems to me that we are taking this question without seriousness. Why would we deny something as important and crucial to the lifeline of America, a simple hearing, a constitutional hearing before the Constitutional Subcommittee on the question of Mr. Baird's constitutional amendment?

I may agree or disagree as to whether or not we amend the Constitution. I certainly agree with Mr. Baird that we should have the ability to restore the Congress within days of a catastrophe, as opposed to 45 to 75 days, the most powerful law-making body in this world.

Additionally I would argue that to place this only in political parties and not have the States have the ability to act quickly is also a catastrophe.

So I think the fact that we have had a statutory response to this—and I am not sure of the legs of that legislation in the Senate—that we really have not done our job by not having the full hearing, a constitutional hearing on the constitutional amendment.

Mr. Baird has made a very good case. I was part of the House's Continuity Committee, appointed by the Speaker and the Leader. We met for at least a year. Our reports were authored, legislation generated. But yet the solution is still not here.

We may take light of this by having this kind of markup where amendments are thrown out piecemeal trying to fix something that maybe cannot be fixed without the direct kind of road map.

So I would just argue to my colleagues that it is shameful that we have forced a legislator, who has worked on this for a number of years, into the predicament of a discharge petition. We know it best, that that will linger and languish where it is even with the signatures of many of us, particularly if it does not secure bipartisan signatures. But he has been forced into this odd and unfortunate legislative procedure because he is struggling for air, drowning in a ocean of confusion and partisanship, because it doesn't make sense that we're not having a hearing before this Committee.

So I would ask my colleagues, in the consideration of this amendment that certainly adds to the enhancement of where we are, it is not the answer to where we need to go. It's shameful that we're not having hearings, and I would ask the Chairman of this Committee and of course I would ask the Speaker to see that this is crucial enough that we have hearings and that we deliberate for a

period of time in the backdrop of a statutory position that has passed out of the House.

I just note that we are in crisis, and I guess I'm contradictory by saying let us have hearings and deliberate. What I'd like to do is to have hearings as quickly as possible and to move forward on the best way to address the question of continuing the United States Congress in light of the potential terrorist act or in light of an actual terrorist attack against this sitting body.

I yield back.

Chairman SENSENBRENNER. The question is offered by the gentleman—for what purpose does the gentleman from California seek recognition?

Mr. BERMAN. Strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. Mr. Chairman, I yield to the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, and I appreciate the gentleman yielding.

Mr. Chairman, I offered this amendment after some thought about the constitutional amendment offered by the gentleman from—by Mr. Baird, which I think has considerable merit, to show some of the serious questions involved in this. My amendment was very hastily drafted. I do not claim it makes a perfect constitutional amendment. Obviously it needs further work.

I offered it to show that there are serious issues involved, that we have not properly considered them. I think that some of the questions or some of the answers here are valid. But I'm going to withdraw the amendment having—at this time because I don't think we're ready for a vote on it, frankly. I don't think we're ready for a vote on any of this at this point.

Chairman SENSENBRENNER. The amendment——

Mr. NADLER. I think that—I think that we ought to hold hearings, as Ms. Lofgren is going to suggest, but at this time I withdraw the amendment.

Chairman SENSENBRENNER. The amendment is withdrawn.

Are there further amendments?

Mr. NADLER. And I yield back.

Chairman SENSENBRENNER. Are there further amendments?

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentlewoman from California seek recognition?

Ms. LOFGREN. Mr. Chairman, I move that we postpone consideration of this proposal, H.J. Res. 83, until Thursday, May 20, 2004. The reason why I would——

Chairman SENSENBRENNER. The question is on the motion. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Mr. Chairman, I move to table the motion.

Chairman SENSENBRENNER. The question is on the motion to table the motion to postpone.

Ms. LOFGREN. Mr. Chairman?

Mr. NADLER. Mr. Chairman? Point of order, Mr. Chairman?

Ms. LOFGREN. May I speak in favor of my motion?

Chairman SENSENBRENNER. The question is on the motion to table——

Mr. NADLER. Mr. Chairman?
Ms. LOFGREN. Mr. Chairman?
Chairman SENSENBRENNER. The motion to table is non-debatable.
Ms. LOFGREN. Mr. Chairman, I was making a motion. I was cut off before I could argue——
Chairman SENSENBRENNER. The rules of the House which apply to the Committee state that when a Member makes a motion, a Member is not recognized to debate on that——
Ms. LOFGREN. I would ask unanimous consent that I—that my motion be withdrawn.
Chairman SENSENBRENNER. Without objection, the motion—well, the pending motion is the motion to table the motion to postpone. Does the gentleman from Ohio make the motion—or ask unanimous consent to withdraw his motion to table first?
Mr. CHABOT. I do.
Chairman SENSENBRENNER. Without objection, the motion to table is withdrawn.
The gentlewoman from California.
Ms. LOFGREN. Mr. Chairman, I believe—I move to strike the last word.
Chairman SENSENBRENNER. The gentlewoman from California did say that she was—for what purpose does the gentlewoman from California seek recognition?
Ms. LOFGREN. I move to strike the last word.
Chairman SENSENBRENNER. The gentlewoman has already been recognized once on—when she made her motion to postpone to a date——
Ms. LOFGREN. Mr. Chairman?
Chairman SENSENBRENNER. Does the gentleman from Ohio wish to renew his motion? Because apparently both motions were supposed to be withdrawn at the same time.
Mr. CHABOT. I'll renew it.
Chairman SENSENBRENNER. The question is now on the motion to table the motion to postpone.
Those in favor will say aye?
Opposed, no?
The ayes appear to have it——
Ms. LOFGREN. Mr. Chairman, I request a rollcall vote.
Chairman SENSENBRENNER. The rollcall is requested. Those in favor of tabling the motion to postpone until May 20 will, as your names are called, answer aye, those opposed, answer no, and the clerk will call the roll.
The CLERK. Mr. Hyde?
[No response.]
The CLERK. Mr. Coble?
Mr. COBLE. Aye.
The CLERK. Mr. Coble, aye. Mr. Smith?
Mr. SMITH. Aye.
The CLERK. Mr. Smith, aye. Mr. Gallegly?
Mr. GALLEGLY. Aye.
The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?
Mr. GOODLATTE. Aye.
The CLERK. Mr. Goodlatte, aye. Mr. Chabot?
Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Jenkins?
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins, aye. Mr. Cannon?
Mr. CANNON. Aye.
The CLERK. Mr. Cannon, aye. Mr. Bachus?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler——
Mr. BACHUS. Aye.
The CLERK. Mr. Bachus, aye. Mr. Green?
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye. Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye. Ms. Hart?
Ms. HART. Aye.
The CLERK. Ms. Hart, aye. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye. Mr. Forbes?
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye. Mr. King?
Mr. KING. Aye.
The CLERK. Mr. King, aye. Mr. Carter?
Mr. CARTER. Aye.
The CLERK. Mr. Carter, aye. Mr. Feeney?
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye. Mrs. Blackburn?
Mrs. BLACKBURN. Aye.
The CLERK. Mrs. Blackburn, aye. Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt, no. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?

Ms. BALDWIN. No.
The CLERK. Ms. Baldwin, no. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no. Ms. Sánchez?
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez, no. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their votes? If—the gentleman from Massachusetts, Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no.
Chairman SENSENBRENNER. The gentleman from California, Mr. Berman.
Mr. BERMAN. No.
The CLERK. Mr. Berman, no.
Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt, no.
Chairman SENSENBRENNER. The clerk will report.
The CLERK. Mr. Chairman, there are 19 ayes and 12 noes.
Chairman SENSENBRENNER. And the motion to table is agreed to.
Are there further amendments? If there are no further amendments, the question——
Ms. LOFGREN. Mr. Chairman? Mr. Chairman?
Chairman SENSENBRENNER. Does the gentlewoman have an amendment?
Ms. LOFGREN. Oh, I seek time. Actually, I think——
Chairman SENSENBRENNER. Well, we have a vote on. The Committee is recessed. Members are encouraged to come back promptly after the two votes on the floor because we still have a number of other measures to dispose of, including this one.
The Committee stands recessed.
[Recess.]
Chairman SENSENBRENNER. The Committee will be in order.
When the Committee recessed for the votes, the bill House Joint Resolution 83 was before the Committee with a motion to report the bill adversely. Are there further amendments?
Mr. SCOTT. Mr. Chairman?
Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.
Mr. SCOTT. Mr. Chairman, I move to strike the last word.
Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.
Mr. SCOTT. Mr. Chairman, I want to add my voice to those that have criticized this procedure. We haven't had a hearing on this very complicated issue. I would hope that—it puts us in an impossible situation, and I would hope that we would delay so that we would have some time to actually fully consider this legislation within a hearing. And I yield the balance of my time to the gentlelady from California.

Ms. LOFGREN. I thank the gentleman for yielding.

What should happen is that the Committee should postpone deliberation on this measure so that hearings can be held in the Subcommittee on the Constitution. And the Subcommittee on the Constitution ought to invite Members of the full Committee who are interested in this issue to come and participate with the Subcommittee in the hearings so that we can all be as informed as possible on the overall issue.

The hearing should be not only on Mr. Baird's proposed constitutional amendment but on the proposed constitutional amendment of Mr. Larson, Mr. Rohrabacher, my constitutional amendment, Mr. Nadler's proposed constitutional amendment, and any other amendments that may be introduced on this subject.

I think the first witness ought to be Speaker Newt Gingrich, who spent a lot of time on the commission working to come to a conclusion to give us some advice. And the second witness ought to be former Speaker Tom Foley.

I think it's regrettable that this Committee is obviously proceeding on a party-line basis in discussing this institutional issue, and I think it's unnecessary when Newt Gingrich and Tom Foley actually worked together and reached the same conclusion, which is that we need to have a constitutional amendment.

Now, whether or not we reach that same conclusion as Mr. Gingrich and Mr. Foley, we ought to be working through these issues together as a team because this is about the institution, it is not about partisanship or our parties.

I am mindful that we have a lot of time here in the House of Representatives that we could spend on this. Last year, we—last week, we came in, we voted to rename some post offices, and we voted to rename some courthouses. Then Wednesday, we adjourned and we all flew home.

Today—yesterday, we came in and we congratulated some sports teams, and today we are doing some—I believe it's more post offices. We're going to run out of post offices and courthouses. And we have time to listen to the scholars, to listen to the distinguished former Members of this House and the leadership, to Senator Alan Simpson, to Mr. Lloyd Cutler, to people who really can inform us on the overall issue.

And so I would hope that my motion to instruct the Subcommittee on the Constitution to hold hearings asking, first, Mr. Gingrich and, second, Mr. Foley to appear, inviting the Members of the full Committee to participate with the Subcommittee and that further consideration on this resolution be postponed until a time after May 20, 2004, be approved on a bipartisan basis by the full Committee.

And I yield back to the gentleman and thank him for the time.

Chairman SENSENBRENNER. Are further amendments? If there are——

Ms. LOFGREN. Mr. Chairman, I made a motion.

Chairman SENSENBRENNER. The gentlewoman was recognized for 5—or not—the time belonged to the gentleman from Virginia, who yielded debate time to the gentlewoman from California. The gentlewoman—neither the gentlewoman from California nor the gentleman from Virginia were recognized for purposes of a motion.

Are there further amendments?

Ms. LOFGREN. Mr. Chairman, I have a motion.

Chairman SENSENBRENNER. The clerk will report the motion.

Ms. LOFGREN. Mr. Chairman, I move that further consideration in this proposal be deferred, that the Subcommittee on the Constitution be instructed to hold hearings, that the first witness should be Speaker Newt Gingrich, the second witness should be Speaker Tom Foley, and that further scholars should inform the full Committee, and that the full Committee ought to be invited by the Subcommittee to participate, and that further proceedings on H.J. Res. 83 be postponed to a time subsequent to May 20, 2004.

Mr. CHABOT. Mr. Chairman, I move that the motion is not in proper order.

Chairman SENSENBRENNER. Does the gentleman make a point of order?

Mr. CHABOT. I make a point of order to that effect.

Chairman SENSENBRENNER. Does anybody wish to be heard on the point of order?

Under the rules of the House, a motion to postpone cannot have conditions attached thereto. Consequently, the point of order that is raised by the gentleman from Ohio is well taken.

Ms. LOFGREN. Mr. Chairman?

Chairman SENSENBRENNER. Are there further amendments?

Ms. LOFGREN. Mr. Chairman, I have a motion.

Chairman SENSENBRENNER. The clerk will report the motion.

Ms. LOFGREN. Mr. Chairman, my motion is to postpone further consideration on H.J. Res. 83 until a time subsequent to Thursday, May 20, 2004.

Mr. CHABOT. Mr. Chairman, move to table the motion.

Chairman SENSENBRENNER. The question is on tabling the motion. Those in favor will say aye? Opposed, no?

The ayes appear to have it. The ayes have it, and the motion to table the motion to postpone——

Ms. LOFGREN. I request a recorded vote.

Chairman SENSENBRENNER. A recorded vote is requested. Those in favor of tabling the motion to postpone will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Jenkins?

[No response.]

The CLERK. Mr. Cannon?

[No response.]

The CLERK. Mr. Bachus?

[No response.]

The CLERK. Mr. Hostettler?
[No response.]
The CLERK. Mr. Green?
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye. Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye. Ms. Hart?
[No response.]
The CLERK. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye. Mr. Forbes?
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye. Mr. King?
Mr. KING. Aye.
The CLERK. Mr. King, aye. Mr. Carter?
Mr. CARTER. Aye.
The CLERK. Mr. Carter, aye. Mr. Feeney?
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye. Mrs. Blackburn?
Mrs. BLACKBURN. Aye.
The CLERK. Mrs. Blackburn, aye. Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no. Mr. Berman?
Mr. BERMAN. No.
The CLERK. Mr. Berman, no. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
[No response.]
The CLERK. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no. Ms. Sánchez?
[No response.]
The CLERK. Mr. Chairman?

Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Are there Members in the chamber who wish to cast or change their votes? If not, the clerk will report.
The CLERK. Mr. Chairman, there are 12 ayes and 6 noes.
Chairman SENSENBRENNER. And the motion to table the motion to postpone is agreed to.
Are there further amendments? If there are no further amendments, the Chair notes the absence of a reporting quorum, and without objection, the previous question is ordered on the motion to report House Joint Resolution 83 adversely. And the Chair would request the staffs on both sides to get their Members present because there are two more bills that we need to get a reporting quorum on to report out before we break.
[Intervening business.]
A reporting quorum is now present. The question occurs on the motion to report House Joint Resolution 83 adversely. Those in favor will say aye. Opposed, no.
The ayes appear to have it.
Mr. COBLE. Rollcall.
Chairman SENSENBRENNER. A rollcall is ordered. Those in favor of reporting House Joint Resolution 83 adversely will, as your names are called, answer aye, those opposed, no, and the clerk will call the roll.
The CLERK. Mr. Hyde?
[No response.]
The CLERK. Mr. Coble?
Mr. COBLE. Aye.
The CLERK. Mr. Coble, aye. Mr. Smith?
Mr. SMITH. Aye.
The CLERK. Mr. Smith, aye. Mr. Gallegly?
[No response.]
The CLERK. Mr. Goodlatte?
Mr. GOODLATTE. Aye.
The CLERK. Mr. Goodlatte, aye. Mr. Chabot?
Mr. CHABOT. Aye.
The CLERK. Mr. Chabot, aye. Mr. Jenkins?
[No response.]
The CLERK. Mr. Cannon?
[No response.]
The CLERK. Mr. Bachus?
Mr. BACHUS. Aye.
The CLERK. Mr. Hostettler?
[No response.]
The CLERK. Mr. Green?
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye. Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye. Ms. Hart?
Ms. HART. Aye.
The CLERK. Ms. Hart, aye. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye. Mr. Forbes?

Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye. Mr. King?
Mr. KING. Aye.
The CLERK. Mr. King, aye. Mr. Carter?
Mr. CARTER. Aye.
The CLERK. Mr. Carter, aye. Mr. Feeney?
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye. Mrs. Blackburn?
Mrs. BLACKBURN. Aye.
The CLERK. Mrs. Blackburn, aye. Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt, no. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin, no. Mr. Weiner?
Mr. WEINER. No.
The CLERK. Mr. Weiner, no. Mr. Schiff?
Mr. SCHIFF. Pass.
The CLERK. Mr. Schiff, pass. Ms. Sánchez?
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez, no. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Members who wish to cast or change their votes? The gentleman from Tennessee, Mr. Jenkins.
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins, aye.
Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler.
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler, aye.
Chairman SENSENBRENNER. The gentleman from California, Mr. Berman.
Mr. BERMAN. No.

The CLERK. Mr. Berman, no.

Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff.

Mr. SCHIFF. No.

The CLERK. Mr. Schiff, no.

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, how I am recorded?

The CLERK. Mr. Chairman, Ms. Jackson Lee is recorded as a no.

Ms. JACKSON LEE. Thank you.

Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report. The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. No.

The CLERK. Mr. Meehan, no.

Chairman SENSENBRENNER. Anybody else? The clerk will try again.

The CLERK. Mr. Chairman, there are 17 ayes and 12 noes.

Chairman SENSENBRENNER. And the motion to report adversely is agreed to. Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes, and all Members will be given 2 days, pursuant to the House rules, in which to submit additional, dissenting, supplemental, or minority views.

DISSENTING VIEWS

H.J. RES. 83, AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REGARDING THE APPOINTMENT OF INDIVIDUALS TO FILL VACANCIES IN THE HOUSE OF REPRESENTATIVES[1]

We strongly support efforts to ensure the continuity of Government in the event of another terrorist attack or other catastrophic incident. However, we dissent from the Majority's determination to adversely report a constitutional amendment to the floor in an effort to discredit the amendment and deny full and fair hearings on the issue.

If ever there was an issue the parties could come together on in a bipartisan way, it would seem to be the issue of continuity. The terrible and fateful attacks of September 11, 2001, have made the American people painfully aware of the destructive intent of our country's terrorist enemies, as well as the increasingly sophisticated and devastating methods by which they carry out their deadly work. The possibility that one day terrorists could detonate a nuclear, chemical, or biological weapon of mass destruction in our Nation's capitol, annihilating major portions of our Federal Government and potentially killing dozens or hundreds of Members of Congress should serve as a source of inspiration to secure our greatest symbol of freedom, our democracy. Unfortunately, the Majority's decision to schedule a markup of H.J. Res. 83 (the "Baird amendment"), without the benefit of first having a hearing, undermines this very notion.

A careful review of the Committee's history with respect to its past treatment of constitutional amendments evidences a strong practice of holding hearings prior to any scheduled full Committee markup of that specific amendment. Consider, for example, the constitutional amendment to protect the rights of crime victims. That amendment was introduced in each consecutive Congress since 1994[2] (the year the current Majority took control of the House), and on each occasion, it has been the wisdom of this Committee to schedule a hearing. In this case, we were given hearings and the constitutional amendment was never scheduled for markup. H.J. Res. 83, by contrast, was scheduled for markup in the complete absence of hearings.

Also, consider the Committee's treatment of the constitutional amendment to prohibit flag burning. A proposal on this issue was introduced in the 108th, 106th, 105th and 104th Congress and each time the Committee undertook hearings prior to scheduling a markup.[3]

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[1] H.R.J. Res. 83, 108th Cong. (2003).

[2] H.R.J. Res. 48, 108th Cong. (2003); H.R.J. Res. 91, 107th Cong. (2002); H.R.J. Res. 64, 106th Cong. (1999); H.R.J. Res. 71, 105th Cong. (1997); H.R.J. Res. 173, 104th Cong. (1996).

[3] H.R.J. Res. 4, 108th Cong. (2003); H.R.J. Res. 33, 106th Cong. (1999); H.R.J. Res. 54, 105th Cong. (1997); H.R.J. Res. 79, 104th Cong. (1995).

Moreover, consider the Committee's treatment of the constitutional amendment to limit the Federal Government's ability to raise taxes. A proposal on this topic was introduced in the 105th and 104th Congress, and hearings were held on both occasions.[4]

With this apparent and undeniably longstanding tradition, the Majority now, however, conveniently asserts that a hearing is unwarranted. Namely, because a hearing was already held on the previous Baird amendment introduced in the 107th Congress.[5] This line of reasoning lacks merit for several important reasons.

First, as previously mentioned, it has been the well-established practice of this Committee to schedule a hearing on such proposals prior to proceeding to a markup. This hard and steadfast rule has prevailed, even under circumstances where the proposed amendments were virtually identical in nature.

Second, even assuming the general rule was subject to change, the two versions of the Baird amendment, H.J. Res. 67 (introduced in the 107th Congress) and H.J. Res. 83 (introduced in the current Congress), are distinct enough to warrant two separate hearings on their own merits. H.J. Res. 83, for example, uses a distinct threshold for making temporary appointments;[6] places considerable limits on the discretion of the chief executive when he or she is authorized to make such appointments;[7] and provides a mechanism for an incapacitated Member to regain his or her seat after recovery from incapacity.[8]

Finally, as the Majority is well aware, the purpose for requesting a hearing on this issue was not so that the Committee could solely debate and consider the virtues of H.J. Res. 83. As Rep. Lofgren explained when offering her motion to postpone consideration of H.J. Res. 83 for two weeks, the underlying objective was to schedule a hearing on all of the various proposals that have been introduced to date on this topic; including her amendment, the Larson amendment, the Rohrabacher amendment and the findings of the bipartisan Continuity of Government Commission. Potentially a two week postponement would allow for careful evaluation of all of the various competing ideas and concepts.

A brief postponement would have also provided the Committee with an opportunity to consider the lingering issues that still need addressing, even with the recent passage of H.R. 2844, the Continuity in Representation Act. Specifically, how the House will function in the 45-day interim period until expedited elections are completed[9], and what to do in the event of Member incapacity.

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[4] H.R.J. Res. 62, 105th Cong. (1997); H.R.J. Res. 159, 104th Cong. (1996).

[5] *See, Hearing on H.R.J. Res. 67 Before the House Subcomm. on the Constitution,* 108th Cong. (Feb. 28, 2002).

[6] H.R.J. Res. 83, § 2, 108th Cong. (2003) (permitting temporary appoints only when a majority of Members are unable to carry out their duties due to death or incapacity.); H.R.J. Res. 67, § 1, 107th Cong. (2001) (allowing for such appointments whenever twenty-five percent (25%) are unable to carry out their duties.)

[7] H.R.J. Res. 83, § 1, 108th Cong. (2003) (Requiring the chief executive of the State to make his appointment from the list of nominees previously supplied by the dead or incapacitated Member.); H.R.J. Res. 67, 107th Cong. (2001)(omitting any similar restriction).

[8] H.R.J. Res. 83, § 2, 108th Cong. (2003) ("An individual appointed to take the place of a Member of the House of Representatives . . . shall serve until the Member regains capacity . . ."); H.R.J. Res. 67, 107th Cong. (2001)(omitting any similar provision).

[9] *See,* Letter from U.S. Rep. Brian Baird to Chairman F. James Sensenbrenner, Jr., and Ranking Member John Conyers, Jr., of the House Judiciary Committee (May 13, 2004).

These are important issues that should not be shortchanged simply to advance a political agenda.

The Majority has already seen fit to schedule a series of five hearings, over the course of the next several months, to discuss the issue of same-sex marriage. With this in mind, a two week postponement to discuss and consider ideas on how best to ensure the continuity of our Government in the event of another terrorist attack or other catastrophic incident should not be considered unreasonable.

For these reasons, we respectfully dissent.

LETTER FROM U.S. REP. BRIAN BAIRD TO CHAIRMAN F. JAMES SENSENBRENNER, JR., AND RANKING MEMBER JOHN CONYERS, JR., OF THE HOUSE JUDICIARY COMMITTEE (MAY 13, 2004)

BRIAN BAIRD
THIRD DISTRICT, WASHINGTON

COMMITTEE ON THE BUDGET

COMMITTEE ON SCIENCE

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May 13, 2004

The Honorable F. James Sensenbrenner, Jr.
Chairman, House Judiciary Committee
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers
Ranking Member, House Judiciary Committee
2426 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Sensenbrenner and Ranking Member Conyers:

On Wednesday May 5th, the Judiciary Committee of the House of Representatives, having never provided an opportunity for a full hearing of H.J. Res. 83 or any of the various alternative proposals by colleagues on both sides of the aisle, nevertheless proceed to markup.

As no opportunity was afforded at the markup for me to offer an explanation of the legislation I drafted, and as many of the same issues are likely to arise if the bill reaches the floor of the House, I am writing today to express my deep concerns with the process and remarks made during the House Judiciary Committee mark-up of H.J. Res. 83. I submit this letter for consideration by the committee and by colleagues in the House.

Before responding to particular issues raised in the committee markup, I would invite members to first read H.J. Res. 83 as well as the discharge petition (007). Then I would invite them to read the transcript of the proceedings to judge for themselves the factual veracity and intellectual merit of the remarks of the Chairman and others who spoke in opposition during the markup.

The Protection of Special Elections
In his opening statement the Chairman asserted that H.J. Res. 83 would "deny the right to elected representation". This is false and the Chair offered no citation to substantiate his assertion. The truth is that nothing in H.J. Res. 83 would deny the rights to election. In fact, the resolution provides for full elections to be held by the affected states as soon as possible after a catastrophe.

The Chairman later asserts that H.J. Res. 83 would override the Chairman's own bill, H.R. 2844, which was recently passed to provide for expedited special elections. The fact is, nothing in H.J. Res. 83 would do this. If the Chairman believes it would, then a fair and open process of hearings and debate could have revealed the merit of that belief and amendments could have been offered to protect the procedures established in H.R. 2844.

The Chairman further argued that H.J. Res. 83 would "forever strip Congress of its authority to expedite special elections in emergencies under its existing constitutional authority." This is fabrication, yet the argument is repeated by other members who spoke against the bill. Repetition of falsehoods is a strategy that has been advanced by some political schools of thought, but that repetition does not make the falsehood true. There is simply nothing in the language or intent of H.J. Res. 83 that supports this charge and neither the Chairman nor any of those who spoke in opposition offered language from the bill itself or other evidence or citation to sustain their assertions.

Let me state with absolute and unequivocal clarity, I fully support the principle that direct elections must be held to permanently replace members killed or incapacitated in a catastrophic event. That question I have answered repeatedly and is addressed clearly in the legislation itself.

By comparison, those who oppose H.J. Res. 83, have never satisfactorily answered the question of what will happen to our nation, and to all of the Article I responsibilities of Congress, in the interim until elections can be held. Just as the Committee has refused to allow a hearing of H.J. Res. 83, the committee has given virtually no attention or hearings to consider what constitutional principles would be preserved or violated in the absence of a House and under the most likely alternative governmental improvisations that would emerge following catastrophic the loss of House members. It is remarkable that such rhetorical energy and attacks have been directed at H.J. Res. 83 and so little attention has been given by either the Constitution subcommittee or the full Judiciary committee to the manifold and egregious constitutional issues that would certainly emerge if H.J. Res. or some comparable mechanism is not enacted.

The Qualities of Appointees

During floor consideration of H.R. 2844, House Majority Leader Tom Delay said "The appointees, the people who would come here to serve, would have no allegiance to the American people. They would not care about what the American people did because they were not elected by the American people. They were appointed by some big power broker back in their State or in their district, or even in their local counties." Similar comments were offered during the markup of H.J. Res. 83. Mr. Sensenbrenner criticized "those who would deny the right to elected representation during the most crucial moments of American history and allow rule by an appointed aristocracy that owes its allegiance not to the people but to those doing the appointing."

Representatives Sensenbrenner and Delay seem to be asserting that although the people who elected their representatives entrust those representatives with the wisdom,

intelligence and integrity to make all of the critical decisions granted them under Article I of the Constitution, those same representatives are expected to suddenly become wildly irresponsible, inept or venal if asked to select people who could temporarily fill their posts in time of crisis.

Surely, the opposite must be true. Again, no one is arguing that appointments are the preferred means of permanently replacing members of Congress. And there is agreement that special elections should be held as soon as possible after a catastrophe. All that has been stipulated from the outset. But to assert that members are incompetent to make prudent decisions about temporary successors, or to assume that those temporary successors would necessarily be incompetent or malevolent is simply preposterous.

The far more likely scenario is that members would take the responsibility very seriously and would exercise great care in choosing potential successors. What is more, the successors themselves, most likely established community leaders, including very likely many former members of Congress or current legislators, would be tremendously responsible and take their posts with the utmost seriousness given the circumstances. In many states, distinguished statesmen and women who have served their nation well would be the most probable choices and it is an insult to the current membership and to those they might consider as successors to suggest they would not perform admirably.

One must ask how it is that in multiple instances the opponents of H.J. Res. 83 decry the illegitimacy of temporary appointees in the House and make such dire claims as cited earlier, yet those same opponents have voiced no concerns about the capacity and performance of an executive branch appointee running the entire country? Is there something magical or inherently superior and less political to the cabinet appointments of a President as compared to members of the House? Are cabinet members, by mere virtue of having been appointed by a president thereby more virtuous as decision makers for the nation? Do they truly have more legitimacy in the minds of our constituents than would the diverse representation and checks provided by temporary appointees chosen by the people's representatives themselves? Is a President, who was not himself directly elected by the people, somehow a superior chooser of appointees than are the directly elected representatives of the people themselves? Would not a Presidential appointee be equally subject to the criticism of owing allegiance "not to the people, but to those doing the appointing"? Is there not greater concern that this appointed executive would serve not just until special elections could be held but for the full remainder of the president's term?

Mr. Coble expressed concern that temporary appointees might not be chosen from within a Congressional district's boundaries. He rightly recognized that the Constitution itself does not require this, but he failed to recognize that, in the absence of a temporary appointment mechanism, most citizens will have no one whatsoever from their district or their state, representing them in the House. Indeed, those whose representative is killed in a catastrophe will be able only to watch in silence and live with the consequences until they finally cast a ballot 45 or 75 days later.

Mr. Chabot, the chair of the Constitution Subcommittee, as part of his criticism of H.J. Res. 83, stated, "Constitutional amendments that would allow appointed members would violate those principles the Founders believed were most important and on which they staked their lives and their fortunes." Mr. Chabot's choice of words is interesting. The Chair of the Constitution subcommittee is in fact paraphrasing not a line from our Constitution, as his comments suggest, but from the Declaration of Independence. In quoting Mr. Jefferson's magnificent language, Mr. Chabot might also have found inspiration in Mr. Jefferson's later comments, which were made about the Constitution, "Let us go on perfecting the Constitution by adding, by way of amendment, those forms which time and trial show are still wanting."

Mr. Chabot might also have considered that the Declaration itself, which he paraphrased, is largely a condemnation of the extreme powers that are vested with King George, an unchecked, abusive, and by virtue of heredity, appointed monarch. By failing to enact measures, such as H.J. Res. 83, Mr. Chabot and the rest of the committee who opposed this bill or alternatives are in effect vesting complete and unchecked powers in an appointed, not an elected executive, most likely a cabinet member, who would, as a consequence of the inaction of this Congress, be left no other choice but to govern, for good or for ill, without congressional consent and with no representation from the House districts.

If the opponents of H.J. Res. are truly concerned about the legitimacy and wisdom of actions taken by appointees, then they should be the first, not the last, to ensure that some mechanism exists to check the actions of the presidential appointees who would acquire unchecked and unlimited powers at the executive level. The constitution is clear that such checks and balances are vital, but this committee, through its inaction, has virtually arrogated all Article I powers to the executive branch.

What is more, one would think the opponents of appointments would hasten to consider changes to the Presidential Succession Act to ensure prompt special elections to replace the appointed President. And if appointment, by its very nature, produces irresponsible outcomes, should they not also insist that vacancies in the Senate be filled by election rather than appointments? It would also be helpful if those who supported the Chairman's bill, HR 2844, which provides for the major political parties to essentially appoint nominees to stand for the elections rather than allowing the people to chose in primaries, would explain why that process of appointing rather than electing candidates does not suffer from many of the same concerns of producing candidates who are beholding to the party appointers above the electorate.

Finally, while expressing grave concerns about the potential actions of temporary appointees, the opponents of H.J. Res. 83 seem unconcerned about the readiness and talents of those who might gain office in the special elections described in HR 2844. Many will likely do their jobs admirably, but it is also likely that many will have no legislative experience whatsoever, will have no Congressional level experience, will have little foreign policy knowledge, and will have no time for the orientation that occurs following normal elections. When some of the most important decisions in the history of

our nation will be confronted, what evidence is there to suggest filling vacancies with inexperienced and unprepared people is a more prudent course for our nation than temporary appointments of highly qualified and experienced people, including, undoubtedly, many who have previously served in Congress and at high levels in government?

The Impact of Temporary Appointment on Subsequent Election
To further the argument that temporary appointments in extraordinary circumstances pose a grave, perhaps mortal, threat to the Republic, Mr. Sensenbrenner and the committee members of the majority warn that anyone appointed to the temporary post would almost surely prevail in all subsequent elections.

On the one hand, the Chairman argues that any process other than election would lead to disaster, yet, on the other hand, he shows so little respect for the voters themselves that he assumes if an appointee were poorly chosen or performed badly in office, the people would not be capable of replacing that person at the first possible election. This is not only inconsistent, it is also contrary to the empirical evidence based on the outcome of Senatorial elections following appointment.

Inconsistencies in Considering a Quorum and the Ex Cathedra Grant of "significant powers" to the President
When not inveighing against H.J. Res. 83, the opponents seem themselves to not fully agree on the conditions under which Congress could function in the absence of temporary appointments. This inconsistency is apparent in the mutually contradictory and unclear statements regarding a quorum and how the house could function after a catastrophe.

For example, the Chairman stated in the markup, "And of course, no law could be enacted solely by a House operating with only a few members alone." Yet later in the markup, Mr. Smith from Texas states, "There is already a House rule that provides that a quorum shall consist of members who are living. During a time of disaster when many members have died, the Speaker can adjust the required quorum to reflect the number of members still living." The chairman still later states, "Congress has granted the President significant powers to act during an emergency. He could maintain the necessary functions of Government along with a Congress utilizing a reduced quorum until elections are held." This final statement is remarkable and will be addressed further.

The Chair asserted elsewhere during the mark-up that decisions of an appointed Congress would be subject to later challenge. This is self contradictory because if the amendment defined in H.J. Res. 83 were enacted, such a challenge would, by the nature of the amendment, be obviated. On the other hand, the Chairman and other opponents raise no fears of subsequent constitutional challenge to decisions made by a House comprised of fewer members than the constitutionally mandated quorum.

Reading such statements of the Chair and his colleagues, members must ask, precisely how many or how few members must be present for a quorum of survivors to be constitutionally legitimate? Citizens themselves must ask how the hundreds of millions

of Americans left without representation would view the legitimacy of decisions reached by a handful of survivors from elsewhere in the nation with no voice from their own district? How is it that those who so earnestly quote Madison and the Constitution in their attacks on H.J. Res. 83 are then so indifferent to the direct text of the Constitution regarding a quorum and how is it they so readily arrogate Congressional authority to a President without ever citing the constitutional or legislative basis for such arrogation?

Of greater importance still, precisely where in the Constitution does it give the Congress the authority to grant "significant powers" to the President and precisely what are those powers to which the Chairman refers? Having made such an important assertion in the Congressional Record, would the distinguished Chairman and others who so steadfastly claim to defend the Constitution, please explain where and when the Congress granted the President such powers? Did Mr. Sensenbrenner just declare this to be fact "ex cathedra" or can and will he produce documentation to explain and substantiate these assertions? And will he please show where the constitutional basis for those statements and the putative granting of "significant powers" is found. Finally, why were the Chairman's statements about a matter of this import not challenged or questioned in any way during the committee hearing itself?

Committee Hearings versus Discharge Petition

Perhaps the most disingenuous of all the arguments offered during the markup were those comparing the decision to go to markup without hearings to calls for a discharge petition to bring the issue directly to the floor for debate. Chairman Sensenbrenner stated in the markup that he was "somewhat puzzled and maybe a bit amused at all of these calls for having a hearing. The author of this resolution, Mr. Baird, filed a discharge petition on April 20th, asking that his bill be brought directly to the floor without any committee consideration." Similar statements were made by other members of the committee majority, including Mr. Goodlatte, later in the hearing.

In fact, the Chairman should not have been puzzled at all by the process because, as he is fully aware, it was his own unwillingness to hold hearings that led to the filing of a discharge petition. For more than two and a half years, the Chairman refused to consider this matter in any detail or to bring it to the floor so the body as a whole could take it under consideration. Then, under pressure, the Chairman finally consented with scarcely a week's notice to hold a markup but allowed no hearings and prevented the legislation's author from having so much as a single minute before the committee to explain the legislation personally.

Had the chairman fairly represented the nature and content of the discharge petition, and had members, such as Mr. Goodlatte studied the discharge petition, they would have known that the discharge is not of H.J. Res. 83 per se, but, rather, for a rule providing for truly fair and full debate of not only H.J. Res. 83 but a number of other proposals for addressing this important issue. What is more, in marked contrast to the proceedings of the committee markup, the rule proposed for discharge allows for real debate in which the authors of all the various proposals would have the opportunity to explain their legislation and answer challenges directly. The discharge petition also allows extensive

opportunities for amendments, even taking the rather uncommon step of allowing several days for contemplation and study between passage of a base bill and further amendments before a final vote.

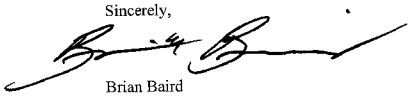
The Lack of an Alternative by the Opponents of H.J. Res. 83
At the end of the day, none of the aforementioned matters are as damning to the case of the opponents as the simple fact that they have yet, after two and a half years, produced a clear and constitutionally valid explanation for how our country will be governed in the 45 to 75 days until special elections will be held.

I have fully acknowledged that other approaches to providing for continuity may be superior to my own and I have offered a mechanism by which the matter can be fully debated. The one thing I am certain of, and the conclusion reached by independent, bipartisan entities such as the Continuity of Government Commission, is this - we have still not solved the core problem and every day we fail to do so we leave our nation, our constituents, our constitution, and the world vulnerable to dangers that are now well known but for which we have refused to adequately prepare.

Final Comments
To my colleagues who spoke up and asked for a full and fair debate and requested that I be given an opportunity to explain my bill and answer the questions and criticism, thank you again for your efforts and for your sense of fair play. I thank you not only for insisting that I have an opportunity to explain the legislation personally but, more importantly, for insisting that you and the rest of the members of the committee, including the opponents, at least have the chance to fully consider the issue before being asked to vote on it. Whatever the legislation before us, I would hope that each member of this body would insist on that.

To those who refused, either by direct actions or by inactions, to grant such fundamental fairness not only to me, but to themselves, I can only say that our nation deserves better. There is a well known phrase describing the consequences of good men doing nothing. In this markup, many otherwise good and decent men and women did worse than nothing.

Sincerely,



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